

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

CALVARY CHAPEL SAN JOSE ET AL,) CV-20-3794-BLF
)
PLAINTIFF,) SAN JOSE, CALIFORNIA
)
VS.) DECEMBER 17, 2020
)
CODY ET AL,) PAGES 1-67
)
DEFENDANT.)
)
_____)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE BETH LABSON FREEMAN
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S

FOR THE PLAINTIFF: **BY: MARIAH ROSE GONDEIRO**
TYLER & BURSCH, LLP
25026 LAS BRISAS ROAD
MURRIETA, CA 92562

FOR THE DEFENDANT: **BY: ROBIN MICHAEL WALL**
CODY **MELISSA R. KINIYALOCTS**
OFFICE OF THE COUNTY COUNSEL
COUNTY OF SANTA CLARA
70 WEST HEDDING STREET
EAST WING, 9TH FLOOR
SAN JOSE, CA 95110

APPEARANCES CONTINUED ON THE NEXT PAGE

OFFICIAL COURT REPORTER: SUMMER FISHER, CSR, CRR
CERTIFICATE NUMBER 13185

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED WITH COMPUTER

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APPEARANCES CONTINUED:

FOR THE DEFENDANT:

BY: TODD GRABARSKY
DEPUTY ATTORNEY GENERAL
300 S. SPRING ST. STE. 1700
LOS ANGELES, CA 90013

1 SAN JOSE, CALIFORNIA

DECEMBER 17, 2020

2 P R O C E E D I N G S

3 (COURT CONVENED AT 2:30 P.M.)

4 THE COURT: HELLO EVERYONE. THANK YOU FOR JOINING US
5 THIS AFTERNOON ON ZOOM. I WISH WE COULD BE IN THE COURTROOM.
6 I KNOW IT WOULD BE A BETTER EXPERIENCE, BUT I KNOW YOU HAVE ALL
7 DONE THIS BEFORE AND WE WILL MAKE THE BEST OF IT.

8 WE ARE GOING TO CALL THE CASE AND GET YOUR APPEARANCES
9 OFFICIALLY ON THE RECORD AND THEN WE WILL GET DOWN TO WORK.

10 THE CLERK: CALLING CASE 20-3794. CALVARY CHAPEL
11 SAN JOSE, ET AL. VERSUS CODY, ET AL.

12 COUNSEL, IF YOU WOULD PLEASE STATE YOUR APPEARANCES,
13 BEGINNING WITH PLAINTIFF, AND THEN MOVING TO DEFENDANTS.

14 MS. GONDEIRO: MARIAH GONDEIRO, COUNSEL FOR THE
15 PLAINTIFFS.

16 THE COURT: GOOD AFTERNOON.

17 MR. WALL: GOOD AFTERNOON, YOUR HONOR.

18 ROBIN WALL ON BEHALF OF THE COUNTY DEFENDANTS.

19 THE COURT: MR. WALL.

20 MS. KINIYALOCTS: AND MELISSA KINIYALOCTS ON BEHALF
21 OF THE COUNTY DEFENDANTS.

22 THE COURT: HELLO.

23 MR. GRABARSKY: GOOD AFTERNOON.

24 DEPUTY ATTORNEY GENERAL TODD GRABARSKY, APPEARING
25 SPECIALLY ON BEHALF OF THE STATE DEFENDANTS WHO HAVE NOT YET

1 BEEN SERVED.

2 I'M JOINED BY MY CO-COUNSEL, LISA PLANK, DEPUTY ATTORNEY
3 GENERAL. I BELIEVE SHE MIGHT BE HAVING SOME TECHNICAL
4 DIFFICULTIES, BUT SHE'S HERE.

5 THE COURT: OKAY. GOOD. THANK YOU.

6 AND MR. GRABARSKY, I APPRECIATE YOU JOINING IN. I SAW THE
7 REQUEST TO JOIN IN THE ARGUMENTS. I UNDERSTAND THE STATE'S
8 CIRCUMSTANCE NOW, HAVING NOT BEEN SERVED, AND OF COURSE A TRO
9 CAN BE HEARD WITHOUT THE NEED TO HAVE COMPLETED THE SERVICE.

10 SO LET ME GIVE YOU MY INITIAL THOUGHTS. I CERTAINLY WANT
11 A FULL ARGUMENT ON THESE ISSUES.

12 MS. GONDEIRO, I AM INCLINED TO GRANT -- OR I'M SORRY, TO
13 DENY THE TRO ON THE BASIS OF YOUNGER ABSTENTION. SO I
14 CERTAINLY WANT TO SPEND QUITE A BIT OF TIME ON THAT.

15 I APPRECIATE THAT THE SCOPE OF THE REQUESTED RELIEF IS
16 VERY NARROW, AND I THINK THAT FOR ALL RESTRAINING ORDERS, THAT
17 THAT IS A WISE WAY TO GO FORWARD, AND YOURS CERTAINLY IS NARROW
18 AND DIRECTED AT THE CONDUCT YOU ARE SEEKING TO STOP.

19 BUT I THINK THAT THE ACTION BY THE STATE THAT YOU ARE
20 SEEKING TO HALT IS A -- ALTHOUGH IT'S AN ENFORCEMENT ACTION AND
21 IT ALSO HAS A CONTEMPT PROVISION THAT GOES DIRECTLY TO THE
22 AUTHORITY OF THE COURT, AND IT'S CLEAR FROM JUDGE KERWIN'S
23 ORDER, THAT YOU HAVE BEEN GIVEN THE OPPORTUNITY AND WILL
24 CONTINUE TO HAVE THE OPPORTUNITY TO RAISE AND ADDRESS THE
25 CONSTITUTIONAL ISSUES THAT ARE BEFORE THIS COURT.

1 IT DOES APPEAR TO ME, I CAN'T SEE ANY ARGUMENT THAT THAT
2 ACTION IS NOT ONGOING, THERE'S ONLY A PRELIMINARY INJUNCTION,
3 AND THAT IS A TEMPORARY ORDER.

4 AND ON YOUR ISSUE OF IRREPARABLE HARM UNDER THE YOUNGER
5 EXCEPTION, IN YOUR BRIEF, I THINK YOU CONFLATE THE STANDARD FOR
6 IRREPARABLE HARM IN ORDER TO OBTAIN A TRO OR PRELIMINARY
7 INJUNCTION WITH THE MUCH HIGHER EXTRAORDINARY LEVEL THAT YOU
8 NEED TO SHOW TO SHOW IRREPARABLE HARM IN THE CONTEXT OF YOUNGER
9 ABSTENTION.

10 AND THE CASES YOU CITE IN SUPPORT OF IRREPARABLE HARM, AND
11 ESPECIALLY THE BROOKLYN DIOCESE CASE, ARE DEALING WITH THE
12 STANDARD IRREPARABLE HARM FOR AN INJUNCTION AND NOT UNDER
13 YOUNGER. AND I READ THOSE CASES AS REQUIRING SOMETHING MORE, A
14 STRONGER SHOWING, AND I THINK UNDER THE CIRCUMSTANCES HERE WITH
15 THE ABILITY TO ARGUE THE CONSTITUTIONAL ISSUES IN STATE COURT,
16 THAT CAUSES ME TO CONCLUDE THAT THE EXCEPTION DOES NOT EXIST.

17 IF I REACH THE ISSUE OF YOUNGER ABSTENTION, I WOULD MAKE
18 NO RULING ON THE UNDERLYING SUBSTANCE OF THE REQUEST FOR
19 RESTRAINING ORDER, AND I THINK THAT'S REQUIRED OF ME.

20 I WOULD LIKE TO HEAR YOUR ARGUMENT ON IT, AND I HAVE SOME
21 QUESTIONS, BUT I AM NOT OFFERING ANY TENTATIVE COMMENTS ON IT
22 AT ALL BECAUSE I'M ACTUALLY NOT EXPECTING THAT I WILL GO THERE.
23 IF LATER IN THE ARGUMENT I CHANGE MY MIND OR FEEL THAT I MIGHT,
24 I MAY ADDRESS THAT.

25 BUT THE ONE THING, MS. GONDEIRO, THAT I DO NEED FROM YOU

1 SO THAT IF I DO ADDRESS THAT, I HAVE NO IDEA WHICH STATE AND
2 COUNTY ORDERS YOU ARE CONTESTING. AND I TRIED TO FOLLOW YOUR
3 COMPLAINT AND I COPIED ALL THE EXHIBITS, BUT YOU HAVE WEBSITES
4 THAT YOU'VE DIRECTED ME TO, WHICH IS COMPLETELY INADEQUATE
5 BECAUSE THE WEBSITES CHANGE AND SOME OF THEM NO LONGER EXIST.
6 AND SO WHEN I OPEN A WEBSITE TODAY, I HAVE NO IDEA IF IT'S THE
7 ONE THAT YOU ARE REFERRING TO.

8 SO I NEED YOU -- I'VE GOT THE FIRST AMENDMENT COMPLAINT IN
9 THE EXHIBITS AND IF YOU'VE GOT HARD COPIES OF THOSE EXHIBITS OR
10 AT LEAST CAN GIVE ME THE ACTUAL DATE OF THE ORDER IN QUESTION,
11 I WILL FIND IT. AND THAT'S NOT A STUMBLING BLOCK, BUT I NEED
12 TO BE VERY PRECISE ON THIS.

13 WELL, I THINK I WILL LEAVE IT AT THAT. MS. GONDEIRO, THIS
14 IS YOUR REQUEST FOR TEMPORARY RESTRAINING ORDER, SO I WANT TO
15 GIVE YOU THE OPPORTUNITY TO START. I WILL GIVE YOU THE LAST
16 WORD AS WELL.

17 MS. GONDEIRO: THANK YOU SO MUCH, YOUR HONOR.

18 YOUR HONOR, THIS HEARING CONCERNS THE PREEMINENT RIGHT
19 PROTECTED UNDER THE CONSTITUTION. THE RIGHT TO ASSEMBLE
20 WORSHIP. THE EXECUTIVE BRANCH IN CALIFORNIA HAS IGNORED THIS
21 RIGHT, AND NOW THE CALIFORNIA STATE COURT, THREE TIMES, HAS
22 IGNORED CLEAR SUPREME COURT AND NINTH CIRCUIT PRECEDENT WHICH
23 UNEQUIVOCALLY STATES THE RESTRICTIONS, AS CONSTRUED IN
24 CALIFORNIA, ARE UNCONSTITUTIONAL, THEREFORE WE ASK THIS COURT
25 TO ENJOIN THE STATE'S PRELIMINARY INJUNCTION AND ISSUE A

1 TEMPORARY RESTRAINING ORDER PREVENTING THE DEFENDANTS FROM
2 ENFORCING THEIR UNCONSTITUTIONAL ORDERS.

3 AS A THRESHOLD MATTER, THIS COURT HAS THE AUTHORITY TO
4 INTERVENE ON MITCHUM V. FOSTER. THE ANTI-INJUNCTION ACT IS NOT
5 VIOLATED WHEN STATE PROCEEDINGS ARE ENJOINED IN RESPONSE TO
6 CONSTITUTIONAL CLAIMS BROUGHT UNDER SECTION 1983. ALL OF OUR
7 CONSTITUTIONAL CLAIMS ARE BROUGHT UNDER SECTION 1983.

8 FURTHER, THE COURT CANNOT ABSTAIN WHEN THERE'S IRREPARABLE
9 INJURIES THAT IS GREAT AND IMMEDIATE OR AN UNUSUAL
10 CIRCUMSTANCE. A STATE CREATES AN IRREPARABLE INJURY THAT IS
11 GREAT AND IMMEDIATE, IF THE EFFECT ON A PLAINTIFF'S SPEECH
12 OUTWEIGHS BOTH THE NEED FOR THE GOVERNMENT TO CONTROL THE
13 CONDUCT BEING REGULATED AND THEIR LACK OF ALTERNATIVE MEANS FOR
14 DOING SO.

15 SANTA CLARA COUNTY WILL LIKELY ARGUE THERE IS A GREAT NEED
16 FOR THEM TO STALK AND HARASS THE CHURCH SERVICES TO
17 ENSURE COMPLIANCE --

18 THE COURT: I'M SORRY, I DON'T THINK THERE'S ANY
19 ALLEGATION BY THE COUNTY THAT THEY WANT TO HARASS YOU. I DON'T
20 REMEMBER THEM SAYING THAT THEY WANT TO COME IN AND HARASS.

21 MS. GONDEIRO: WELL, THAT IS THE UNFORTUNATE EFFECT
22 OF THIS INJUNCTION, IS THAT BY THEM INTERFERING WITH CHURCH
23 SERVICES --

24 THE COURT: THERE HAS BEEN NO EVIDENCE OF THAT. YOU
25 RAISE THAT -- YOU THREW THAT IN AT THE END IN YOUR REPLY BRIEF,

1 IT WAS NOT RAISED IN YOUR INITIAL PAPERS.

2 MS. GONDEIRO: LIKE I SAID, IT'S THE UNFORTUNATE --

3 THE COURT: IT WAS NOT RAISED, AND IT IS AN
4 EXCEPTION. YOU DID NOT RAISE BAD FAITH AND HARASSMENT IN YOUR
5 PAPERS AND I WON'T CONSIDER IT.

6 MS. GONDEIRO: OKAY. THAT'S FINE, YOUR HONOR.

7 THANK YOU.

8 SANTA CLARA COUNTY WILL ALSO LIKELY SAY THAT OUR CLIENTS
9 ARE LIKELY TO CONTRIBUTE TO A SUPER SPREADER EVENT, BUT THAT IS
10 ALL SPECULATIVE AT THIS POINT. THEY HAVE YET TO CONTRIBUTE TO
11 ANY KNOWN COVID-19 CASE, AND THE DEFENDANTS DO NOT HAVE
12 EVIDENCE OTHERWISE.

13 FURTHER, AS EXPRESSED IN DR. BHATTACHARYA'S DECLARATION,
14 SANTA CLARA COUNTY CANNOT CLAIM THAT COVID 19 IS SPREAD AT A
15 HIGHER RATE THAN NORMAL WHEN PEOPLE GATHER AT CHURCHES TO SING.
16 INDEED, OUR EXPERT CONCLUDED THAT HE WAS UNAWARE OF ANY
17 EVIDENCE TO SUGGEST GATHERINGS ARE MORE LIKELY TO RESULT IN THE
18 SPREAD OF THE COVID VIRUS THAN MALLS, STORES AND PUBLIC
19 TRANSIT.

20 OPPOSING COUNSEL MAY CLAIM OUR EXPERT RELIES ON BAD -- OR
21 OUR EXPERT MAY RELY ON BAD SCIENCE, BUT THAT WOULD BE
22 INAPPROPRIATE TO SAY AT THIS STAGE UNTIL DISCOVERY IS COMPLETED
23 AND A FULL TRIAL ON THE MERITS IS CONDUCTED, WE WILL NOT KNOW
24 WHOSE SCIENCE IS BETTER.

25 REGARDING THE HARM TO THE PLAINTIFFS, THEY WILL SUFFER

1 GREAT AND IMMEDIATE HARM THAT DEFINITELY RISES TO THE LEVEL OF
2 EXTRAORDINARY HARM. AS THE SUPREME COURT AFFIRMED IN ROMAN
3 CATHOLIC DIOCESE OF BROOKLYN THE LOSS OF FIRST AMENDMENT
4 FREEDOMS, FOR EVEN MINIMAL PERIODS, UNQUESTIONABLY CONSTITUTES
5 IRREPARABLE HARM.

6 THIS ISN'T JUST A MINIMAL PERIOD, YOUR HONOR. THEY ARE
7 ASKING FOR -- THEY ARE ASKING THAT OUR CLIENTS COMPLETELY SHUT
8 DOWN THEIR CHURCH FOR MONTHS. THIS WILL UNDOUBTEDLY LEAD TO
9 IRREPARABLE INJURY.

10 THE COURT: I WASN'T AWARE OF AN EXISTING ORDER THAT
11 LASTED MORE THAN THREE WEEKS. I THOUGHT THE GOVERNOR'S ORDER,
12 OR THE LOCAL ORDER YESTERDAY FOR THE BAY AREA, LASTS UNTIL
13 JANUARY 8TH. AM I MISTAKEN ON THAT?

14 MS. GONDEIRO: SO THE REGIONAL ORDER LASTS FOR THREE
15 WEEKS, BUT THEN IF I UNDERSTAND CORRECTLY, IT WOULD GO BACK TO
16 THE BLUEPRINT AND THEY WILL STILL BE UNDER TIER 1. AND UNDER
17 TIER 1, INDOOR SERVICES ARE COMPLETELY BANNED. BUT EVEN UNDER
18 TIER 2 AND TIER 3, THE LIMITATIONS ARE STILL PRETTY SEVERE
19 BECAUSE ONLY 100 PEOPLE CAN ATTEND, WHEN THE CHURCH CAN FIT UP
20 TO 1,800 PEOPLE, AND 800 PEOPLE GO TO THAT CHURCH.

21 THE COURT: PASTOR MCCLURE GAVE ME THAT NUMBER. IS
22 THAT -- I DIDN'T -- I DON'T RECALL THAT. IN HIS DECLARATION,
23 HE INDICATED THAT THAT WAS THE FIRE CODE OCCUPANCY. AND I ONLY
24 SAY IT BECAUSE I'M NOT FAMILIAR WITH YOUR FACILITY.

25 MS. GONDEIRO: UH-HUH. HE DID STATE IN HIS

1 DECLARATION THAT THE BUILDING COULD FIT UP TO 1,800 PEOPLE.

2 THE COURT: I HAVE NO DOUBT IT COULD FIT THAT MANY,
3 AND MY CHAMBERS COULD FIT 200, BUT THE FIRE MARSHAL WOULD NOT
4 APPROVE OF IT. AND THIS IS AN IMPORTANT POINT, ACTUALLY,
5 BECAUSE --

6 MS. GONDEIRO: OKAY.

7 THE COURT: I DON'T KNOW THAT I WILL GET TO IT, BUT I
8 DON'T -- AND I JUST -- AND CONFIRMING, HE DID NOT REPRESENT A
9 FIRE MARSHAL CERTIFICATION OF THE FACILITY, WHICH OF COURSE
10 WOULD BE POSTED IN THE CHURCH, BECAUSE I THINK THAT'S REQUIRED
11 BY LAW. BUT MS. KINIYALOGTS MAY HAVE THAT INFORMATION FOR ME.
12 I'M JUST UNAWARE BECAUSE I'VE NEVER VISITED YOUR CHURCH.

13 MS. GONDEIRO: OKAY.

14 SO YOUR HONOR, WITH THAT SAID, NOT ONLY DOES THE COURT
15 HAVE A RIGHT TO INTERVENE, IT ACTUALLY HAS A DUTY TO INTERVENE
16 IN LIGHT OF BROOKLYN DIOCESE.

17 DEFENDANT'S CLAIM, YOUR HONOR, THAT --

18 THE COURT: SO IN THE BROOKLYN DIOCESE CASE, THE CASE
19 DIDN'T COME UP IN THIS SAME PROCEDURAL POSTURE, SO I DON'T --
20 THE UNITED STATES SUPREME COURT DID NOT ADDRESS ABSTENTION IN
21 BROOKLYN DIOCESE.

22 MS. GONDEIRO: YES, IT WAS AN INJUNCTION, YOUR HONOR.

23 BUT THE COURT MADE CLEAR, YOU KNOW, THAT THESE TYPES OF
24 CAPACITY LIMITATIONS WITH WHICH THE STATE AND COUNTY IS SEEKING
25 TO ENFORCE, ARE UNCONSTITUTIONAL AND ALSO LEAD TO IRREPARABLE

1 HARM.

2 THE COURT: IS IT YOUR POSITION THAT IF ANY TYPE OF
3 ACTIVITY IS ALLOWED TO GO FORWARD, THAT THE PLACES OF WORSHIP
4 ARE ALLOWED -- MUST BE GIVEN THE SAME OCCUPANCY LIMITS?

5 SO FOR EXAMPLE, IF GROCERY STORES, I BELIEVE A STANDALONE
6 GROCERY STORE TODAY CAN HAVE A 35 PERCENT OCCUPANCY, AND IT'S
7 CONSIDERED ESSENTIAL. AND UNDER THESE LIMITS, THE PLACES OF
8 WORSHIP ARE IN THE CATEGORY OF GATHERINGS, WHICH IS NOT GROCERY
9 STORES, I THINK WE CAN ALL AGREE ON THAT. SO WOULD IT BE YOUR
10 POSITION THAT IF GROCERY STORES CAN OPERATE WITH 35 PERCENT,
11 THEN PLACES OF WORSHIP SHOULD BE GIVEN THE SAME?

12 MS. GONDEIRO: YES, YOUR HONOR.

13 AND I WOULD ALSO SAY THAT THAT'S WHAT THE SUPREME COURT
14 SAYS TOO. THE SUPREME COURT APPLIES A BROAD COMPARISON AND
15 STATED CLEARLY THAT THE GOVERNOR CUOMO'S CAPACITY LIMITATIONS
16 WERE UNCONSTITUTIONAL BECAUSE IT TREATED BUSINESSES OR
17 RELIGIOUS SERVICES MORE SEVERELY, AND IF JUSTICE KAVANAUGH AND
18 GORSUCH MENTION RETAIL STORES, BICYCLE SHOPS, MALLS, THAT'S
19 EXACTLY WHAT'S HAPPENING HERE, YOU HAVE RELIGIOUS SERVICES THAT
20 IN TIER 1, ARE COMPLETELY BANNED, WHILE MALLS, RETAIL STORES,
21 AND PUBLIC TRANSIT ARE ALLOWED TO REMAIN OPEN ON A CERTAIN
22 CAPACITY PERCENTAGE.

23 THE COURT: OF COURSE THAT'S NOT THE POSITION YOU
24 TOOK IN YOUR PAPERS, BECAUSE IN YOUR PAPERS, YOU SUGGEST -- YOU
25 ARGUE AND YOU PROVIDE ME WITH AN ORDER BARRING THE COUNTY FROM

1 PROHIBITING INDOOR RELIGIOUS ASSEMBLY.

2 SO THAT WOULD MEAN THAT YOUR ENTIRE MEMBERSHIP OF 1,800
3 COULD COME IN ON SUNDAY MORNING UNDER THE ORDER THAT YOU GAVE
4 ME. IS THAT STILL YOUR POSITION?

5 MS. GONDEIRO: WE WOULD LIKE, YOUR HONOR, THAT THE
6 COUNTY AND THE STATE TREAT OUR CLIENTS IN THE SAME WAY THAT
7 THEY TREAT OTHER ESSENTIAL BUSINESSES. LIKE I SAID, THE
8 BUILDING COULD FIT UP TO 1,800 PEOPLE. IF THE COUNTY ALLOWS
9 THEM TO, AT THE MINIMUM, SEAT UP TO 25 PERCENT, THAT'S A BIG
10 CHUNK OF THEIR CONGREGATION.

11 THE COURT: THE RELIEF YOU REQUESTED IN YOUR PAPERS
12 IS NOT THE RELIEF YOU ARE ASKING FOR TODAY.

13 MS. GONDEIRO: THE RELIEF, YOUR HONOR, THAT I ASKED
14 IN THE PROPOSED ORDER, IS THAT THIS COURT ENJOIN THE
15 PRELIMINARY INJUNCTION.

16 THE COURT: NO, WELL, THAT'S NOT WHAT IT SAYS. THAT
17 THEY BE ENJOINED DIRECTLY OR INDIRECTLY FROM TAKING ANY ACTION
18 TO ENFORCE IT OR ANY OTHER SUCH FUTURE ORDERS OF THE COURT
19 LIMITING, BARRING OR PROHIBITING INDOOR RELIGIOUS ASSEMBLY.

20 SO YOU DID ASK FOR MORE. I JUST ALWAYS NEED CLARITY ON
21 WHAT YOU ARE ASKING FOR, FOR TEMPORARY RESTRAINING ORDER OR
22 PRELIMINARY INJUNCTION. EVERY JUDGE STARTS WITH THE REQUESTED
23 RELIEF AND WE WORK BACKWARDS BECAUSE THAT'S THE ONLY WAY TO
24 EVALUATE WHAT YOU ARE REQUESTING. SO THAT'S WHY I'M PRESSING
25 ON THIS, EVEN THOUGH I DON'T -- I WANT TO KNOW WHAT YOU ARE

1 ASKING FOR. AS I SAY, I DON'T THINK I'M GOING TO GET TO THIS,
2 BUT THESE ARE QUESTIONS I WOULD HATE TO HAVE IF I THEN LET YOU
3 GO AND WAS SITTING HERE TRYING TO FIGURE OUT WHAT TO DO.

4 SO GO AHEAD, PLEASE.

5 MS. GONDEIRO: NO. THANK YOU, YOUR HONOR. AND I
6 APPRECIATE YOU RAISING THOSE QUESTIONS.

7 I WANT TO GO BACK TO ABSTENTION BECAUSE I KNOW THAT THAT'S
8 THE VERY IMPORTANT POINT YOU MAKE.

9 THE COURT: OKAY.

10 MS. GONDEIRO: DEFENDANTS CLAIM THIS COURT SHOULD
11 ABSTAIN FROM ENJOINING THE SUPERIOR COURT'S PROCEEDINGS IN
12 LIGHT OF YOUNGER, BUT WHAT THE DEFENDANTS SEEM TO FORGET IS
13 THAT THE PLAINTIFFS ACTUALLY HAD AN ONGOING CASE IN FEDERAL
14 COURT, NOT THE OTHER WAY AROUND.

15 THEY ARE TRYING TO REALLY CHANGE THE NARRATIVE, BUT THE
16 FACTS ARE WE FILED THIS LAWSUIT IN FEDERAL COURT ON JUNE 6TH.
17 PLAINTIFFS SAT ON THEIR HANDS FOR FIVE MONTHS, THEY DID
18 NOTHING, THEY DID NOTHING IN STATE COURT, THEY DID NOT FILE
19 ANYTHING UNTIL THE END OF OCTOBER, RIGHT BEFORE A HEARING ON
20 THE MERITS, RIGHT BEFORE WE HAD A HEARING ON THE MOTIONS TO
21 DISMISS.

22 SO THEIR LAWSUIT, YOUR HONOR --

23 THE COURT: WELL, WHAT CASE DO YOU POINT ME TO THAT
24 REQUIRES THAT THE STATE COURT ACTION BE FILED IN ADVANCE OF THE
25 FEDERAL ACTION? I FOUND NONE. I READ ALL THE CASES YOU CITED

1 TO ME, AND IF I MISREAD THEM, I WOULD APPRECIATE YOU POINTING
2 ME TO ONE THAT SAYS THAT THE STATE CASE MUST BE FIRST FILED AS
3 OPPOSED TO ONGOING.

4 MS. GONDEIRO: SO THE STATE CASE DOESN'T NEED TO BE
5 FIRST FILED, YOUR HONOR, WHAT'S IMPORTANT IS THAT IT NOT BE
6 FILED BEFORE ANY PROCEEDING ON THE MERITS, BUT WE WERE RIGHT IN
7 THE MIDST OF A HEARING ON THE MERITS WHEN THEY WENT TO STATE
8 COURT TO SEEK INTERVENTION.

9 THE COURT: WELL, AND OF COURSE AS A RESULT OF THAT
10 HEARING, THERE WAS NO OPERATIVE COMPLAINT BECAUSE I GRANTED THE
11 MOTION TO DISMISS.

12 MS. GONDEIRO: YES, BUT THERE WAS --

13 THE COURT: WELL, THERE WAS NO OPERATIVE COMPLAINT.
14 THERE WERE NO CLAIMS PENDING IN FEDERAL COURT. YOU HAD LEAVE
15 TO AMEND, WHICH YOU TOOK ADVANTAGE OF AND FILED THE AMENDED
16 COMPLAINT ON DECEMBER 11TH, I BELIEVE.

17 MS. GONDEIRO: YES.

18 BUT I THINK THE POINT IS THAT WE HAD AN ONGOING PROCEEDING
19 ON THE MERITS OCCURRING.

20 THE COURT: I DON'T DISAGREE WITH THAT, BUT I DON'T
21 SEE ANYTHING IN THE YOUNGER LINE OF CASES THAT SAYS ANYTHING
22 ABOUT THE FEDERAL ACTION. THEY TALK ABOUT THE STATUS OF THE
23 STATE ACTION AS BEING ONGOING, AND CERTAINLY WITH THE
24 PRELIMINARY INJUNCTION ISSUED IN STATE COURT, THAT IS AN
25 ONGOING MATTER, THAT'S NOT A JUDGMENT, IT'S A PRELIMINARY

1 ORDER, AND YOU WILL HAVE YOUR RIGHT TO A TRIAL ON THE MERITS.

2 MS. GONDEIRO: OKAY, YOUR HONOR.

3 AND AGAIN, YOUR HONOR, NOT ONLY -- I MEAN, AGAIN, SO TWO
4 MAIN POINTS, THE STATE COURT PROCEEDING WAS NOT ONGOING, AND
5 THEY KIND OF OVERLOOKED THAT IN THEIR BRIEFING.

6 THE COURT: AT WHAT POINT WAS IT NOT ONGOING?

7 MS. GONDEIRO: BECAUSE THERE WAS NO DECISION -- THERE
8 HAD BEEN NO DECISION ON THE MERITS.

9 THE COURT: YOU MEAN IN JUNE? I DON'T UNDERSTAND
10 WHAT YOU MEAN, IT WAS NOT ONGOING. I KNOW YOU MADE THIS POINT
11 IN YOUR REPLY, AND I DIDN'T UNDERSTAND IT. SO THE STATE COURT
12 ACTION WAS FILED IN OCTOBER, CORRECT?

13 MS. GONDEIRO: YES, THE END OF OCTOBER.

14 THE COURT: AND IT IS STILL -- IT'S STILL A FILED
15 ACTIVE CASE ON THE SANTA CLARA DOCKET, YES?

16 MS. GONDEIRO: YES.

17 THE COURT: I DON'T KNOW WHAT THE MEANING OF ONGOING
18 IS IF THAT'S NOT IT.

19 MS. GONDEIRO: BUT THE POINT IS, THIS FEDERAL COURT,
20 YOUR HONOR -- WE HAD FIRST FILED A CASE HERE AND WE HAD
21 PROCEEDINGS ON THE MERITS.

22 THE COURT: YES.

23 MS. GONDEIRO: AND THEY DIRECTLY INTERFERED WITH
24 THOSE PROCEEDINGS BY FILING A CASE IN STATE COURT.

25 THE COURT: WELL, ARE YOU SUGGESTING THAT THE COUNTY

1 COULD HAVE COME INTO FEDERAL COURT TO ENFORCE -- WITH AN
2 ENFORCEMENT ACTION? I DON'T HAVE JURISDICTION OVER THAT.

3 MS. GONDEIRO: YOUR HONOR, THEY COULD HAVE FILED A
4 COUNTERCLAIM OR A COUNTER-LAWSUIT AND THEY COULD HAVE SOUGHT
5 RELIEF IN THIS COURT. THEY DIDN'T NEED TO GO TO STATE COURT TO
6 SEEK RELIEF.

7 THE COURT: WELL, I WILL LET MS. KINIYALOGTS DISCUSS
8 THAT. I'M NOT AWARE THAT I WOULD HAVE JURISDICTION TO ENFORCE
9 A COUNTY ORDER AND PROCEED IN CONTEMPT PROCEEDINGS OR ISSUE A
10 PRELIMINARY INJUNCTION AGAINST YOUR CLIENT.

11 MS. GONDEIRO: SO YOUR HONOR, AGAIN, SO I WILL MAKE
12 THAT POINT AGAIN. AND THEN SECOND, IT WOULD BE IRREPARABLE
13 HARM THAT RISES TO AN EXTRAORDINARY LEVEL. WE ARE TALKING
14 ABOUT COMPLETELY BANNING 800 PEOPLE FROM SINGING INDOORS AND
15 DIRECTLY VIOLATING THEIR RIGHTS. THAT COULD LAST FOR MONTHS.

16 SO NOW I WANT TO GO ON TO THE MERITS AND FOCUS ON THE
17 DIOCESE OF BROOKLYN, WHICH I BELIEVE IS GOING TO ALSO BE THE
18 CRUX OF THIS DISCUSSION.

19 THE COURT: OKAY.

20 MS. GONDEIRO: THE SUPREME COURT HELD THE NUMERICAL
21 CAPS IN GOVERNOR CUOMO'S CLUSTER INITIATIVE WERE NOT NEUTRAL
22 AND VIOLATE THE FREE EXERCISE, BECAUSE IN THE RED ZONE, A
23 CHURCH MAY ADMIT TEN PEOPLE, BUT BUSINESSES DEEMED ESSENTIAL,
24 SUCH AS ACUPUNCTURE FACILITIES, CAMPGROUNDS, GARAGES, AND THEN
25 GORSUCH ADDED HARDWARE STORES, LIQUOR STORES, BICYCLE SHOPS,

1 OTHER ESSENTIAL BUSINESSES, AND THEN JUDGE KAVANAUGH ADDED
2 GROCERY STORES, PET STORES, THOSE WERE ALL TREATED -- YOU KNOW,
3 RELIGIOUS SERVICES WERE TREATED MORE HARSHLY THAN ALL THOSE
4 BUSINESSES.

5 THE DEFENDANTS CLAIM THAT THE RESTRICTIONS ARE NEUTRAL
6 BECAUSE THEY TREAT ALL GATHERINGS THE SAME, BUT THIS IS
7 INCORRECT FOR MULTIPLE REASONS.

8 FOR ONE, JUDGE KAVANAUGH REJECTED A SIMILAR ARGUMENT
9 BROUGHT BY NEW YORK WHO CLAIMED THEY DID NOT DISCRIMINATE
10 AGAINST RELIGION BECAUSE SOME SECULAR BUSINESSES, LIKE MOVIE
11 THEATRES, WERE TREATED EQUALLY OR MORE HARSHLY.

12 JUDGE KAVANAUGH HELD UNDER THIS COURT'S PRECEDENT, IT DOES
13 NOT SUFFICE FOR A STATE TO POINT OUT THAT AS COMPARED TO HOUSES
14 OF WORSHIP, SOME SECULAR BUSINESSES ARE SUBJECT TO SIMILARLY
15 SEVERE OR EVEN MORE SEVERE RESTRICTIONS; RATHER, ONCE A STATE
16 CREATES A FAVORED CLASS OF BUSINESSES, AS NEW YORK DID, THE
17 STATE MUST JUSTIFY WHY HOUSES OF WORSHIP ARE EXCLUDED.

18 AND AS YOU WILL SEE, YOUR HONOR, IN EXHIBIT B -- OR
19 EXHIBIT A, WHICH WE ATTACHED --

20 THE COURT: I AM GIVING NO CREDENCE TO EXHIBIT A
21 BECAUSE IT HAS NO CITATIONS, IT DOESN'T BEAR ANY RESEMBLANCE TO
22 ANY DOCUMENT I'VE EVER SEEN AND IT'S JUST ARGUMENT. I WILL
23 CONSIDER IT AS ARGUMENT, BUT THAT'S NOT EVIDENCE. YOU DO
24 UNDERSTAND THAT.

25 MS. GONDEIRO: I DON'T UNDERSTAND WHY IT ISN'T

1 EVIDENCE BECAUSE THESE ARE -- THESE LIMITATIONS ARE PULLED UP
2 FROM THE COUNTY ORDERS.

3 THE COURT: YOU DIDN'T CITE THEM.

4 WELL, FIRST OF ALL, THERE'S NO ORDINANCE THAT IDENTIFIES,
5 I DON'T BELIEVE THE ORDINANCE CALLS OUT CHURCHES SEPARATELY.
6 THIS IS A SUMMARY DOCUMENT THAT IS ALLOWED UNDER THE FEDERAL
7 RULES OF EVIDENCE UNDER CERTAIN CIRCUMSTANCES. AND SUMMARY
8 DOCUMENTS CAN BE VERY HELPFUL, BUT YOU HAVE TO TELL ME WHERE
9 YOU DERIVED THIS INFORMATION.

10 SO FIRST OF ALL, YOU ARE DERIVING SOME OF IT FROM OTHER
11 COURT CASES, AND THEN SOME YOU LABEL CALIFORNIA AND SANTA CLARA
12 WITHOUT TELLING ME WHAT ORDERS IT COMES FROM. SO I DON'T --
13 CERTAINLY IN ROMAN CATHOLIC DIOCESE, THE SUPREME COURT, AND I
14 HAVE A COPY OF THAT, OF COURSE, I MEAN, THAT WAS EASY TO FIND,
15 I HAVE A COPY OF IT RIGHT HERE, AND CHURCHES WERE IDENTIFIED
16 SPECIALLY, OR HOUSES OF WORSHIP WERE IDENTIFIED EXPRESSLY.

17 SO IT'S A SUMMARY DOCUMENT THAT'S NOT HELPFUL TO ME EXCEPT
18 IN MAYBE THE BROADEST SENSE.

19 MS. GONDEIRO: IN THE DECLARATION, WE DO CITE TO
20 THE --

21 THE COURT: WHAT STATE OF CALIFORNIA ORDER ARE YOU
22 TRYING TO -- ARE YOU ASKING ME TO REVIEW ON YOUR CONSTITUTIONAL
23 ARGUMENT? I NEED TO KNOW WHAT THEY ARE.

24 MS. GONDEIRO: THE BLUEPRINT.

25 THE COURT: AND MAYBE THERE'S ONLY ONE DATE, I DON'T

1 KNOW WHETHER IT'S BEEN REVISED OR NOT.

2 MS. GONDEIRO: BLUEPRINT -- WELL, RIGHT NOW
3 SANTA CLARA COUNTY, AS YOU WILL SEE IN THE EXHIBIT, IS IN THE
4 PURPLE TIER, PLACES OF WORSHIP ARE COMPLETELY BANNED. I
5 INCLUDE THIS IN MY ARGUMENT SECTION IN THE --

6 THE COURT: I JUST WANT TO KNOW WHAT DOCUMENT IT IS,
7 THAT'S ALL. I JUST WANT TO KNOW WHAT IT IS.

8 YOU KNOW, WHEN WE REVIEW THINGS, JUST AS THE SUPREME COURT
9 DID, WE LOOK AT THE DOCUMENT, WE DON'T LOOK AT THE GLOSS PUT ON
10 THEM IN ARGUMENT.

11 SO WHAT'S THE DOCUMENT? YOU ARE SAYING THE CALIFORNIA
12 BLUEPRINT IS THE STATE DOCUMENT?

13 MS. GONDEIRO: UH-HUH.

14 THE COURT: AND YOU ARE TELLING ME THAT THERE'S ONLY
15 ONE OF THOSE. SO MR. GRABARSKY CAN PERHAPS SAY HE EITHER
16 AGREES WITH THAT OR DISAGREES WITH THAT WHEN I GET TO HIM.

17 AND THEN WHAT'S THE SANTA CLARA DOCUMENT OR MULTIPLE
18 DOCUMENTS THAT YOU ARE --

19 MS. GONDEIRO: THE SANTA CLARA COUNTY MANDATORY
20 DIRECTIVE ON GATHERINGS, THAT'S ONE. AND THEN --

21 THE COURT: WHAT'S THE DATE OF THAT?

22 MS. GONDEIRO: THE DATE OF THAT IS, I BELIEVE IT WAS
23 SOME TIME IN NOVEMBER.

24 THE COURT: WELL, WAS THERE ONLY ONE IN NOVEMBER? I
25 MEAN, WE ALL KNOW THIS HAS BEEN RAPIDLY CHANGING. YOU HAVE TO

1 CHECK EVERY DAY, NEW INFORMATION COMES OUT. THE GOVERNOR USED
2 TO WAIT AND DO IT ONCE A WEEK, AND THAT DIDN'T TURN OUT TO BE
3 SUFFICIENT TO GIVE INFORMATION. NOW IT'S EVERY DAY.

4 SO I JUST WANT TO KNOW WHICH ONE IT IS SO I CAN READ IT.

5 MS. GONDEIRO: WELL, YOUR HONOR, MOST RECENTLY IN
6 EARLY DECEMBER, THE REGIONAL ORDER, WE WILL JUST LOOK AT THE
7 MOST RECENT ORDER ISSUED BY GOVERNOR NEWSOM.

8 THE COURT: I DON'T KNOW WHAT YOU ARE -- I'M GLAD --
9 I WILL LOOK AT ANY DOCUMENT YOU WANT, YOU JUST HAVE TO TELL ME.
10 A DOCUMENT HAS A NAME AND A DATE.

11 YOU TELL ME THE "REGIONAL ORDER," I DON'T KNOW WHAT THAT
12 IS. IF IT'S ATTACHED TO YOUR COMPLAINT, JUST GIVE ME AN
13 EXHIBIT AND I'M GLAD TO LOOK AT THAT. IF THE DEFENDANTS
14 ATTACHED IT TO THEIR PAPERS, JUST GIVE ME THE EXHIBIT NUMBER.
15 I'M NOT DISAGREEING WITH YOU, I JUST WANT YOU TO TELL ME WHAT
16 DOCUMENT IT IS.

17 MS. GONDEIRO: YES.

18 YOUR HONOR, I HAVE ALL OF THOSE IN THE FIRST AMENDED
19 COMPLAINT WHICH I CITE TO YOU IN THE STATEMENT OF FACTS.

20 THE COURT: SO IN THE FIRST AMENDED COMPLAINT YOU DO
21 TWO THINGS, YOU PROVIDE ME WITH 14 EXHIBITS -- WELL, YOU DIDN'T
22 PROVIDE THEM TO ME, I HAD TO PRINT THEM OUT MYSELF, YOU
23 PROVIDED ME WITH 14 EXHIBITS AND THEN A LOT OF CITATIONS TO
24 WEBSITES, AND THEY CHANGED OR WERE NONEXISTENT, SO I CAN'T GO
25 TO AN ACTIVE WEBSITE AND KNOW THAT I'M LOOKING AT WHAT YOU ARE

1 ASKING ME TO LOOK AT. I HAVE NO WAY OF DOING THAT.

2 THAT'S THE PROBLEM. I DON'T KNOW WHEN IT EVER BECAME
3 ACCEPTABLE TO CITE SOMETHING BY WEBSITE AS OPPOSED TO ATTACHING
4 IT TO THE DOCUMENT, AND THAT'S WHAT'S CAUSED ME TO HAVE TO ASK
5 YOU THIS.

6 I JUST WANT TO KNOW WHAT THE DOCUMENT IS. AND IF YOU
7 WOULD LIKE TO SUBMIT THAT TO ME TONIGHT, THAT'S FINE. I MAY
8 NOT BE REACHING THIS ISSUE, BUT I JUST WANT A COPY OF THE
9 DOCUMENT YOU ARE CONTESTING, THAT'S ALL IT IS.

10 MS. GONDEIRO: YES, YOUR HONOR. I CAN SUBMIT HARD
11 COPIES OF THAT INSTEAD OF THE ACTUAL WEBSITE TO YOU TONIGHT.

12 THE COURT: THAT'S WHAT I WILL NEED.

13 MS. GONDEIRO: THANK YOU.

14 THE COURT: AND I ASSUME IT'S ONE STATE DOCUMENT, THE
15 BLUEPRINT, AND IT'S -- I DON'T KNOW --

16 MS. GONDEIRO: YES, THE BLUEPRINT, AND THEN THE
17 REGIONAL ORDER.

18 THE COURT: AND THE REGIONAL ORDER. THAT WOULD BE
19 GREAT. AND IF YOU COULD SUBMIT THOSE TO ME TONIGHT BY THE END
20 OF THE DAY, WHICH I KNOW GOES UNTIL MIDNIGHT, BUT I OBVIOUSLY
21 NEED TO DO THIS QUICKLY. I MAY NOT BE REACHING IT, SO, YOU
22 KNOW, BUT IF I REACH THIS ARGUMENT, I WANT TO RULE ON WHAT YOU
23 ARE ASKING ME TO RULE ON. THAT'S THE WHOLE POINT OF MY
24 QUESTION, OKAY.

25 MS. GONDEIRO: YES. THANK YOU, YOUR HONOR.

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THE COURT: OKAY. GO AHEAD.

MS. GONDEIRO: AND SO THE COUNTY ALSO POINTS OUT THAT THE RESTRICTIONS ARE NEUTRAL BECAUSE THEY TREAT ALL GATHERINGS THE SAME. BUT THERE'S A PROBLEM WITH THAT BECAUSE THE MANDATORY DIRECTIVE ON GATHERINGS, IT APPEARS NEUTRAL ON ITS FACE, BUT IT'S ACTUALLY ACTIVITY, GERRYMANDERING, DOES NOT DEFINE CARD ROOMS, GYMS OR SHOPPING CENTERS, WHERE PEOPLE WILL INEVITABLY GATHER, AND THESE ACTIVITIES ARE SUBJECT TO LIGHTER RESTRICTIONS BECAUSE THEY ARE NOT DEFINED AS A GATHERING.

IF THERE'S ANY DOUBT, YOUR HONOR, THAT THE STATE AND COUNTY RESTRICTIONS ARE NOT UNCONSTITUTIONAL, HARVEST ROCK CHURCH AND SOUTH BAY MAKE IT CLEAR. IN HARVEST ROCK, THE SUPREME COURT VACATED THE LOWER COURT'S DECISION AND REMANDED THE CASE BACK TO THE DISTRICT COURT IN LIGHT OF THE ROMAN CATHOLIC DIOCESE OF BROOKLYN.

IN SOUTH BAY, THE NINTH CIRCUIT VACATED THE LOWER COURT'S DECISION, DENYING A MOTION FOR INJUNCTIVE RELIEF FILED BY SOUTH BAY AND REMANDED IT BACK TO THE DISTRICT COURT FOR FURTHER CONSIDERATION.

IF IT WERE NOT CLEAR ENOUGH, JUST A FEW DAYS AGO THE NINTH CIRCUIT HELD NEVADA GOVERNOR STEVE SISOLAK'S DIRECTIVE WAS NOT NEUTRAL BECAUSE IT TREATED MANY SECULAR ENTITIES LIKE CASINOS, BOWLING ALLEYS, RESTAURANTS AND ARCADES DIFFERENTLY THAN HOUSES OF WORSHIP. CASINOS, BOWLING ALLEYS, RETAIL

1 BUSINESSSES, RESTAURANTS, ARCADES AND OTHER SIMILAR ENTITIES ARE
2 LIMITED TO 50 PERCENT CAPACITY, YET HOUSES OF WORSHIP ARE ONLY
3 LIMITED TO 50 PEOPLE.

4 THE COURT: I THOUGHT IT WAS INTERESTING IN THE
5 NINTH CIRCUIT CASE, THAT THE COURT ORDERED THAT THE LIMIT WOULD
6 BE 25 PERCENT, EVEN THOUGH THERE WAS THAT 50 PERCENT. I
7 THOUGHT IT WAS INTERESTING THAT THERE WERE SOME SERVICES THAT
8 COULD BE AT 50 PERCENT, I THINK YOU QUOTE THAT CORRECTLY. BUT
9 IN THE CONCLUSION, THE COURT ORDERED THAT THE STATE COULD NOT
10 IMPOSE LIMITS ON IN-PERSON SERVICES IN HOUSES OF WORSHIP THAT
11 ARE LESS FAVORABLE THAN 25 PERCENT. I'M NOT SURE WHERE THAT
12 CAME FROM, I DIDN'T HEAR THE ARGUMENT OR READ THE BRIEFS, I
13 JUST READ THE NINTH CIRCUIT ORDER.

14 MS. GONDEIRO: I'M NOT SURE EITHER, BUT I THINK --
15 WELL, WHAT THE COURT DID FIND THOUGH IS THAT THE CAPACITY
16 LIMITATIONS ON RELIGIOUS SERVICES WERE ULTIMATELY
17 UNCONSTITUTIONAL BECAUSE THOSE ESSENTIAL BUSINESSES WERE
18 TREATED MORE FAVORABLY.

19 THE COURT: YES.

20 MS. GONDEIRO: AND SO, YOUR HONOR, THESE CASES ALL
21 BUT ASSURE THAT THE ORDERS THAT WE ARE CHALLENGING THAT ARE
22 ENFORCED BY THE STATE AND COUNTY ARE NOT NEUTRAL AND ARE
23 COMPLETELY DISPOSITIVE OF THIS CASE.

24 THE COURT: SO GOING BACK TO THE ISSUE OF THE YOUNGER
25 ABSTENTION, YOU AGREE THAT YOU HAVE THE FULL -- HAVE HAD AND

1 CONTINUE TO HAVE THE FULL OPPORTUNITY TO ADDRESS THE
2 CONSTITUTIONAL ISSUES BEFORE THE STATE COURT. AND I ASSUME IN
3 YOUR WRIT OF MANDATE THAT YOU ALREADY FILED, I PRESUME YOU
4 FILED ONE, OR IN YOUR APPEAL, THAT YOU MUST HAVE ALREADY HAVE
5 FILED, BECAUSE OF THE CLAIMED IRREPARABLE HARM, THAT YOU HAVE
6 MADE THOSE ARGUMENTS AND YOU CAN CONFIRM THAT YOU FILED ANY OF
7 THOSE REQUESTS FOR RELIEF.

8 MS. GONDEIRO: YES, YOUR HONOR.

9 WELL, THE COUNTY MAKES THE POINT THAT WE WAITED TO FILE
10 THIS PRELIMINARY INJUNCTION, BUT THE REASON IS, IS BECAUSE THE
11 ORDERS WERE CONSTANTLY CHANGING. AND EXTRAORDINARY EVENTS
12 HAPPENED, THEY WENT TO STATE COURT SEEKING TO ENFORCE AN
13 UNCONSTITUTIONAL TEMPORARY RESTRAINING ORDER AND THEN ALSO
14 SOUGHT CONTEMPT. AND SO NOW OUR CLIENT IS NOW IN CONTEMPT.
15 AND SO THOSE EXTRAORDINARY EVENTS SPURRED THIS TEMPORARY
16 RESTRAINING ORDER BROUGHT IN --

17 THE COURT: BUT WHAT I'M ASKING IS -- AND I
18 APPRECIATE THAT. I'M JUST LOOKING FOR SOME DATES HERE. THE
19 PRELIMINARY INJUNCTION WAS ISSUED ON DECEMBER 1ST; IS THAT
20 CORRECT? AND THE ORDER WAS ACTUALLY FILED ON DECEMBER 4TH?

21 MS. GONDEIRO: YES. THE ORDER WAS FILED, BUT I WANT
22 TO KNOW BECAUSE THIS IS VERY IMPORTANT, THE JUDGE HAS YET TO
23 ACTUALLY SIGN THE PROPOSED ORDER. AS YOU WILL SEE IN THE ORDER
24 WHICH WE ATTACHED, THE JUDGE HAS HIS REASONING AND THEN HIS
25 CONCLUSION --

1 THE COURT: SO HE -- THERE IS A WRITTEN FIVE-PAGE
2 ORDER FROM JUDGE KIRWAN GRANTING THE PRELIMINARY INJUNCTION.
3 AND THEN ON THE -- LET'S SEE IF I CAN GET MY HANDS ON THAT.
4 OKAY. I HAVE A LOT OF PAPERS. MAYBE THAT WAS IN YOUR PAPERS.

5 MR. WALL: IF I COULD OFFER A WORD TO HELP,
6 YOUR HONOR.

7 THE COURT: YES. THANK YOU, MR. WALL.

8 MR. WALL: SO THE TRO, THERE WAS A TRO ENTERED IN THE
9 STATE COURT ACTION WHICH WAS FOLLOWED BY A MODIFIED TRO.

10 THE COURT: YES.

11 MR. WALL: AFTER THE MODIFIED TRO WAS ENTERED ON
12 NOVEMBER 24TH.

13 THE COURT: YES.

14 MR. WALL: THE SUPERIOR COURT JUDGE KIRWAN WENT ON TO
15 HOLD A PRELIMINARY INJUNCTION HEARING ON THE TERMS OF THAT TRO.

16 AND SO WHILE THERE'S A WRITTEN ORDER EXPLAINING THE
17 REASONS FOR GRANTING THE PRELIMINARY INJUNCTION THAT WAS ISSUED
18 ON DECEMBER 4TH AND IT'S ECF FILING 42-5, IT'S AN ATTACHMENT TO
19 THE COMPLAINT. IT DOESN'T INCLUDE -- IT DOESN'T REPEAT THE
20 TERMS OF THE OF THE REVISED TRO, WHICH IS ECF 42-3, BUT THOSE
21 ARE THE ORDERS THAT -- THOSE ARE THE TERMS THAT IT IMPLEMENTED.

22 AND THE FIRST TERM OF WHICH TO HELP MAYBE SIMPLIFY THE
23 ANALYSIS, IS THAT THE COURT ORDERED CALVARY AND PASTOR MCCLURE
24 NOT TO CONDUCT ANY GATHERING THAT DOES NOT FULLY COMPLY WITH
25 THE STATE AND COUNTY PUBLIC HEALTH ORDERS. IT WENT ON TO

1 SPECIFY THE SPECIFIC TERMS THAT WERE THEN APPLICABLE ON
2 NOVEMBER 24TH, PURSUANT TO WHICH INDOOR GATHERINGS WOULD HAVE
3 BEEN PROHIBITED AND OUTDOOR GATHERINGS WOULD HAVE BEEN ALLOWED
4 UP TO 200 PEOPLE, AND ALSO FACE COVERINGS WOULD HAVE BEEN
5 REQUIRED. SOCIAL DISTANCING REQUIREMENTS WOULD HAVE BEEN IN
6 PLACE. SINGING AND CHANTING INDOORS AT GATHERINGS WOULD HAVE
7 BEEN PROHIBITED, AND OPERATING IN SANTA CLARA COUNTY WITHOUT A
8 SOCIAL DISTANCING PROTOCOL WOULD HAVE BEEN PROHIBITED, ALL OF
9 WHICH CALVARY AND PASTOR MCCLURE ARE IN VIOLATION OF, AND NONE
10 OF WHICH ARE ADDRESSED IN THE ROMAN CATHOLIC DIOCESE DECISION
11 OR THE NINTH CIRCUIT OPINION, EXCEPT FOR THE CAPACITY
12 LIMITATIONS.

13 BUT I JUST WANTED TO HELP YOUR HONOR FIND THAT IN THE
14 RECORD.

15 THE COURT: ALL RIGHT.

16 SO JUST -- AND I'M JUST LOOKING AT THE RECORD. SO THE
17 CONTEMPT PROCEEDINGS WERE BASED ON THE MODIFIED TRO, NOT THE
18 PRELIMINARY INJUNCTION?

19 MR. WALL: IT'S COMPLICATED, YOUR HONOR.

20 THE CONTEMPT PROCEEDINGS WERE BASED ON THE TRO. SO WHEN
21 THE INITIAL TRO ISSUED ON NOVEMBER 2ND, PLAINTIFFS CALVARY AND
22 PASTOR MCCLURE CONTINUED TO VIOLATE THE PUBLIC HEALTH ORDERS
23 AND WERE THUS IN VIOLATION OF THAT INITIAL TRO.

24 THE CONTEMPT MOTION WAS BROUGHT ONLY AS TO THE VIOLATIONS
25 ON THAT INITIAL TRO ISSUED ON NOVEMBER 2ND, AND SO IT ONLY

1 COVERED THE VIOLATIONS OF THE SUPERIOR COURT'S ORDERS THROUGH
2 NOVEMBER 24TH WHEN THE REVISED TRO ISSUED, WHICH LEAVES THE
3 QUESTION, GIVEN CALVARY AND PASTOR MCCLURE'S ONGOING
4 NONCOMPLIANCE, WHETHER ADDITIONAL MOTIONS FOR CONTEMPT WILL BE
5 BROUGHT IN THOSE PROCEEDINGS.

6 THE COURT: OKAY.

7 BUT THE -- I'VE GOT AN ORDER DATED DECEMBER 4TH GRANTING
8 THE PRELIMINARY INJUNCTION. HAS A PRELIMINARY INJUNCTION
9 ISSUED? MS. GONDEIRO SUGGESTS IT HAS NOT.

10 MS. GONDEIRO: YES, THE JUDGE HAS NOT ACTUALLY SIGNED
11 THE PROPOSED ORDER WITH THE TERMS OF THE PRELIMINARY
12 INJUNCTION.

13 THE COURT: DO YOU AGREE, MR. WALL? IS THAT YOUR
14 UNDERSTANDING AS WELL?

15 MR. WALL: MY UNDERSTANDING IS THAT THE COURT ISSUED
16 AN ORDER TO THE PLAINTIFFS PURSUANT TO THE REVISED TRO ON
17 NOVEMBER 24TH, AND THEN BY WAY OF THE PRELIMINARY INJUNCTION
18 HEARING, MADE THAT THE PRELIMINARY INJUNCTION, DID NOT ISSUE A
19 SEPARATE ORDER REPEATING THOSE TERMS.

20 THAT THE DECEMBER 1ST -- THE ORDER WAS GRANTED ON
21 DECEMBER 1ST IN THE MINUTE ORDER AT THE HEARING ON THE
22 PRELIMINARY INJUNCTION WHICH WAS TO BE FOLLOWED BY A STATEMENT
23 OF THE REASONS FOR GRANTING THE PRELIMINARY INJUNCTION.

24 PERHAPS MY COLLEAGUE CAN PROVIDE MORE ON THIS ONE.

25 THE COURT: SO YOU ARE SAYING THAT THE MODIFIED TRO

1 BECAME THE TERMS OF THE PRELIMINARY INJUNCTION.

2 MR. WALL: THAT'S CORRECT, YOUR HONOR.

3 THE COURT: OKAY. ALL RIGHT.

4 NOW LET ME GO BACK TO MS. GONDEIRO. I JUST AM TRYING TO
5 UNDERSTAND THE DOCUMENTS, THAT WAS THE ONLY REASON FOR THAT
6 DETOUR SO THANK YOU.

7 MS. GONDEIRO: THAT'S OKAY. THERE ARE A LOT OF
8 DOCUMENTS.

9 THE COURT: THERE ARE A LOT OF DOCUMENTS, YES.

10 MS. GONDEIRO: A LOT OF DOCUMENTS TO KEEP TRACK OF.
11 SO THANK YOU, YOUR HONOR, FOR BEING PATIENT.

12 SO I'M NOW GOING TO TURN TO THE ESTABLISHMENT CLAUSE.

13 THE COURT: OKAY.

14 MS. GONDEIRO: THE ORDERS ARE UNCONSTITUTIONAL UNDER
15 THE LEMON TEST WHICH REQUIRES THAT A LAW HAVE A LEGITIMATE
16 SECULAR PURPOSE, THE PRIMARY EFFECT NEITHER ADVANCE OR INHIBIT
17 RELIGION, AND IT DOESN'T RESULT IN EXCESSIVE ENTANGLEMENT OF
18 GOVERNMENT AND RELIGION.

19 THE PRELIMINARY INJUNCTION HAS THE PRIMARY EFFECT OF
20 INHIBITING RELIGION BECAUSE IT TREATS RELIGIOUS GATHERINGS
21 UNIQUELY AND DISCRIMINATORILY.

22 THE COURT: WHEN YOU SAY "UNIQUELY," WHAT DO YOU MEAN
23 BY "UNIQUELY?" I THOUGHT THEY WERE PART OF A CATEGORY OF
24 GATHERINGS, AND "UNIQUE" MEANS ONE OF A KIND.

25 MS. GONDEIRO: YES.

1 AS YOU WILL SEE IN THE GATHERINGS, THE MANDATORY DIRECTIVE
2 ON GATHERINGS, ONLY CERTAIN GATHERINGS ARE LISTED. YOU KNOW,
3 IT DOESN'T INCLUDE SHOPPING CENTERS OR CARD ROOMS, WHERE THE
4 RESULT OF WHICH MANY PEOPLE WILL BE --

5 THE COURT: I DON'T DISAGREE WITH THAT, I ONLY HAVE
6 AN ISSUE WITH YOUR USE OF THE WORD "UNIQUE." UNIQUE IS ONE OF
7 A KIND. SO THAT'S ALL. LET'S MOVE ON.

8 MS. GONDEIRO: OKAY.

9 PLACES OF WORSHIP ARE NOT DEEMED ESSENTIAL AND ARE SUBJECT
10 TO HARSHER RESTRICTIONS WHILE NUMEROUS ENTITIES ARE.

11 AGAIN, THE DEFENDANTS CLAIM THAT THE ORDERS DO NOT HAVE
12 THE PRIMARY EFFECT OF INHIBITING RELIGION BECAUSE THEY ARE
13 NEUTRAL AND GENERALLY APPLICABLE TO ALL GATHERINGS. BUT AS
14 ESTABLISHED EARLIER WITH THE BROOKLYN DIOCESE CASE THEY ARE NOT
15 NEUTRAL IN LIGHT OF THAT SUPREME COURT CASE, AND NOW WE HAVE A
16 NINTH CIRCUIT CASE.

17 FINALLY, THE RESTRICTIONS FALL SHORT OF THE THIRD PRONG.
18 IN LEMON, THE SUPREME COURT STATED, EXCESSIVE GOVERNMENT
19 ENTANGLEMENT OCCURS WHEN A LAW IS COMPREHENSIVE, DISCRIMINATING
20 AND REQUIRES CONTINUING STATE SURVEILLANCE.

21 THIS IS NOT A ROUTINE, REGULATORY INTERACTION SUCH AS A
22 FIRE INSPECTION OR A BUILDING ZONE INSPECTION OR THE
23 RECORDKEEPING REQUIREMENTS OF THE FAIR LABOR STANDARD ACT.
24 HERE WE ARE TALKING ABOUT DAILY AND PERSISTENT MONITORING OF
25 CHURCH CONGREGANTS, JUST LIKE IN LEMON WHERE PRIVATE SCHOOL

1 TEACHERS HAD TO BE CONTINUALLY MONITORED, THE PRELIMINARY
2 INJUNCTION ALLOWS GOVERNMENT OFFICIALS TO ATTEND CHURCH
3 SERVICES AND PRAYER MEETINGS TO ENSURE COMPLIANCE. THIS TYPE
4 OF SURVEILLANCE IS UNCONSCIONABLE AND UNDOUBTEDLY RESULTS IN
5 EXCESSIVE ENTANGLEMENT.

6 SO ON CONCLUSION, YOUR HONOR, THE PLAINTIFFS HAVE PROVEN
7 THAT THIS PRELIMINARY INJUNCTION WILL RESULT IN IRREPARABLE
8 HARM. THE HARM THAT THE COUNTY CITES TO IS ALL SPECULATIVE.
9 THEY HAVE YET TO PROVE THAT THIS CHURCH IS CONTRIBUTING TO A
10 SUPER SPREADER EVENT. AND WE CAN ALSO PREVAIL ON THE MERITS.

11 AND SO WITH THAT, I ASK THAT THIS COURT GRANT THIS
12 TEMPORARY RESTRAINING ORDER.

13 THE COURT: OKAY. THANK YOU.

14 I HAVE ONE MORE COMMENT BEFORE I TURN TO THE COUNTY AND
15 THE STATE. AND THIS IS BY WAY OF A WARNING FOR THE FUTURE. I
16 PUT OUT AN ORDER ALLOWING REPLY, AND IT WAS HELPFUL TO ME. MY
17 ORDER SAID THAT IT WAS TO BE NO MORE THAN FIVE PAGES.
18 CONSIDERING THAT THIS WHOLE CASE IS ABOUT YOUR CLIENT'S
19 CONTEMPT OF A COURT ORDER, I WAS PRETTY SURPRISED THAT YOU
20 VIOLATED MY COURT ORDER BY GIVING ME A SEVEN-PAGE BRIEF.

21 I READ THE WHOLE THING, AND I WILL CONSIDER IT. IF THAT
22 HAPPENS AGAIN, I WILL THROW AWAY YOUR ENTIRE BRIEF WITHOUT THE
23 OPPORTUNITY TO FILE A COMPLIANT BRIEF; DO YOU UNDERSTAND?

24 MS. GONDEIRO: YES, YOUR HONOR.

25 THE COURT: ALL RIGHT. THANK YOU.

1 LET ME -- I DON'T KNOW WHO IS GOING TO ARGUE FOR THE
2 COUNTY, MR. WALL, MS. KINIYALOCTS.

3 MR. WALL: I WILL, YOUR HONOR.

4 GOOD AFTERNOON, YOUR HONOR. THERE ARE FOUR REASONS.

5 PLAINTIFFS FOCUS ON ROMAN CATHOLIC AND CALVARY CHAPEL, AND
6 THERE ARE FOUR REASONS WHY THEY DO NOT CONTROL THIS CASE. THE
7 FIRST, AS YOUR HONOR POINTS OUT, IS THAT NEITHER CASE INVOLVED
8 AN ABSTENTION ISSUE. WHEREAS HERE, PLAINTIFFS SEEK INJUNCTION
9 AGAINST A PENDING STATE COURT ENFORCEMENT AND PUBLIC NUISANCE
10 PROCEEDING.

11 THE SECOND AND THIRD REASON ARE LEGAL REASONS. THERE IS
12 NO EVIDENCE OF RELIGIOUS TARGETING HERE AS THERE WAS IN
13 ROMAN CATHOLIC. AND THERE IS NO EVIDENCE THAT THE STATE AND
14 COUNTY HAVE SINGLED OUT HOUSES OF WORSHIP FOR ESPECIALLY HARSH
15 TREATMENT, AND THAT'S THE LANGUAGE OF ROMAN CATHOLIC.

16 THERE'S A FOURTH REASON THAT THIS CASE IS DISTINGUISHABLE
17 AND IT'S A FACTUAL ONE. THESE PARTICULAR PLAINTIFFS, UNLIKE
18 THE PLAINTIFFS IN ROMAN CATHOLIC, DO NOT HAVE A STRONG TRACK
19 RECORD IN COMPLIANCE WITH THE COVID 19 RESTRICTIONS AND
20 REGULATIONS. THEY HAVE REPEATEDLY VIOLATED STATE AND COUNTY
21 HEALTH ORDERS, AND EVEN THE ORDERS OF ANOTHER COURT, WITH
22 RESPECT TO ASCII LIMITS, MASK REQUIREMENTS, SOCIAL DISTANCING,
23 AND THE OTHER REQUIREMENTS OF THE COUNTY HEALTH ORDER.

24 AND THESE FOUR FACTORS TAKE THIS OUT OF THE GAMBIT OF
25 ROMAN CATHOLIC AND THE NINTH CIRCUIT'S DECISION.

1 I WOULD LIKE TO BEGIN WITH ABSTENTION. YOU KNOW, AND
2 OBVIOUSLY WHERE I THINK THE COURT SHOULD ABSTAIN FROM ENJOINING
3 THE DEFENDANTS TO FROM CONTINUING TO PURSUE A STATE COURT
4 PUBLIC NUISANCE PROCEEDING. PLAINTIFFS HAVE OFFERED FOUR
5 ARGUMENTS IN THEIR REPLY, NONE OF WHICH I THINK SUPPORT DENYING
6 ABSTENTION HERE.

7 THE FIRST IS THEY CLAIM WE HAVE NOT SHOWN THAT THIS IS AN
8 ONGOING PROCEEDING IN STATE COURT. IT OBVIOUSLY IS. TO GIVE
9 YOUR HONOR AN UPDATE, EARLIER THIS WEEK WE ISSUED WRITTEN
10 DISCOVERY OR DISCOVERY REQUESTS IN THE STATE COURT PROCEEDING.
11 WE ALSO SUBMITTED THIS WEEK THE WRITTEN ORDER ON THE CONTEMPT
12 FINDING FOR THE COURT'S CONSIDERATION. IT HAS YET TO BE ISSUED
13 BY THE COURT. THOSE ARE OBVIOUSLY STILL ONGOING PROCEEDINGS.
14 WE ARE STILL AT THE PRELIMINARY INJUNCTION STAGE, OBVIOUSLY, WE
15 HAVEN'T REACHED A FINAL JUDGMENT IN THE ACTION.

16 AND PLAINTIFFS CALVARY AND PASTOR MCCLURE, HAVE FILED A
17 MOTION FOR RECONSIDERATION OF THE PRELIMINARY INJUNCTION IN
18 LIGHT OF THE ROMAN CATHOLIC DECISION AND THE HARVEST ROCK
19 DECISION TO REMAND TO DISTRICT COURT.

20 AND SO NOT ONLY DO THEY HAVE AN OPPORTUNITY TO VINDICATE
21 THEIR FEDERAL RIGHTS IN THE STATE COURT PROCEEDING, THEY ARE
22 CONTINUING TO PURSUE THAT REMEDY, THAT OPTION.

23 SECOND, CALVARY AND PASTOR MCCLURE HAVE ARGUED THAT WE
24 HAVE NOT SHOWN THAT THE FEDERAL ACTION WILL DIRECTLY INTERFERE
25 WITH THE STATE COURT PROCEEDINGS. THIS IS A STRANGE ARGUMENT

1 GIVEN THAT THE PENDING TRO APPLICATION ASKS YOUR HONOR TO
2 DIRECTLY INTERFERE WITH THE STATE COURT PROCEEDING, WHICH I
3 THINK ADDRESSES THAT.

4 AND AT THIS TIME WE ARE NOT ASKING THIS COURT, FOR
5 EXAMPLE, TO DISMISS THIS ENTIRE FEDERAL LAWSUIT ON ABSTENTION
6 GROUNDS, JUST ABSTAIN FROM ISSUING A TRO THAT WOULD INTERFERE
7 WITH THE PENDING STATE COURT ENFORCEMENT ACTION.

8 THIRD, PLAINTIFFS ACCUSE US, THE DEFENDANTS, OF DELAYING
9 AND BURDENING THE STATE COURT ACTION, AND SAY THAT WE SAT ON
10 OUR HANDS FOR MONTHS.

11 THAT IS NOT THE CASE. TO WALK THROUGH THE FACTS,
12 YOUR HONOR, ON AUGUST 11TH, 2020, THE BOARD OF SUPERVISORS FOR
13 SANTA CLARA COUNTY PASSED THEIR URGENCY ORDINANCE WHICH
14 ESTABLISHED A COMPREHENSIVE CIVIL ENFORCEMENT PROGRAM IN THE
15 COUNTY WITH RESPECT TO ITS PUBLIC HEALTH ORDERS. NOW THIS IS
16 MUCH BROADER THAN CHURCH ENFORCEMENT, IT WASN'T PROMPTED BY
17 THIS CASE OR CALVARY'S NONCOMPLIANCE, BUT IT WAS A GENERAL
18 CIVIL ENFORCEMENT PROGRAM COUNTY WIDE.

19 AND THE EVIDENCE OF THAT IS, THAT WAS DISCUSSED IN THE
20 ADMINISTRATIVE HEARING ON OUR -- IT'S IN THE TRANSCRIPT ECF 56,
21 JEREMY AVILA'S DECLARATION IN THE CASE, AND IT'S EXHIBIT M.

22 THE TEN DAYS LATER AFTER THE CIVIL ENFORCEMENT PROGRAM WAS
23 PUT INTO PLACE BY THE BOARD OF SUPERVISORS, THE COUNTY SERVED A
24 CEASE AND DESIST LETTER ON CALVARY AND THAT WAS ON AUGUST 21ST,
25 2020.

1 SOON AFTER THAT, THE CHURCH DID NOT COMPLY, OBVIOUSLY, AND
2 THE COUNTY SERVED NOTICES OF VIOLATION AND ISSUED FINES AGAINST
3 THE CHURCH.

4 THOSE -- THE ISSUANCE OF THOSE VIOLATIONS AND FINES WAS
5 CHALLENGED IN AN ADMINISTRATIVE HEARING BEFORE THE COUNTY, A
6 HEARING OFFICER ON OCTOBER 21ST, AND THOSE FINES WERE UPHELD.

7 THROUGHOUT THIS PERIOD, FROM MAY THROUGH THE END OF
8 OCTOBER, THE COUNTY ALSO MADE SIGNIFICANT EFFORTS TO EDUCATE
9 CALVARY AND PASTOR MCCLURE AND PERSUADE THEM TO FOLLOW THE
10 RULES AND OTHERWISE TRY TO RESOLVE THIS DISPUTE BETWEEN THE
11 COUNTY AND THE CHURCH AND ITS PASTOR, SHORT OF LITIGATION. AND
12 THAT'S IN MR. AVILA'S DECLARATION AT PARAGRAPHS 3 THROUGH 6.

13 FINALLY, AFTER ALL OF THESE EFFORTS HAVE FAILED, EDUCATION
14 EFFORTS, EFFORTS TO ISSUE VOLUNTARY COMPLIANCE, NOTICES OF
15 VIOLATION, FINES, THE COUNTY BROUGHT SUIT ON OCTOBER 27TH IN AN
16 EX PARTE TRO APPLICATION THE NEXT DAY.

17 THE COUNTY THEN VIGOROUSLY PURSUED THOSE PROCEEDINGS, AND
18 WE OBTAINED A TRO AND THEN A REVISED TRO, AND ULTIMATELY A
19 PRELIMINARY INJUNCTION FROM JUDGE KIRWAN IN THE SUPERIOR COURT.

20 DEFENDANTS -- THE PLAINTIFF CALVARY AND PASTOR MCCLURE
21 ALSO ACCUSE US OF FORUM SHOPPING. AGAIN, IT'S NOT A FAIR
22 ACCUSATION HERE. THE COUNTY, ITS HEALTH OFFICER AND ITS
23 DISTRICT ATTORNEY, BROUGHT A PUBLIC NUISANCE AND ENFORCEMENT
24 ACTION ASSERTING VIOLATIONS OF STATE LAW IN STATE COURT, WHICH
25 IS AN APPROPRIATE FORUM. IT WAS PARTICULARLY APPROPRIATE TO

1 BRING THE STATE COURT CLAIMS IN THAT FORUM AT THE TIME THAT WE
2 DID BECAUSE WE HAD A PENDING MOTION TO DISMISS IN THIS COURT TO
3 DISMISS CALVARY'S CLAIMS HERE.

4 IF WE HAD -- WHETHER OR NOT WE COULD HAVE BROUGHT STATE
5 CLAIMS IN THIS COURT, IT WOULD HAVE BEEN INAPPROPRIATE TO DO SO
6 WITH OUR PENDING MOTION TO DISMISS, ASSUMING IT HAD BEEN
7 GRANTED, AND IT WAS IN FACT GRANTED, THE COURT WOULD HAVE BEEN
8 LEFT WITH TWO, AT BEST, TWO PENDANT STATE LAW CLAIMS THAT WERE
9 THEN WITHOUT A FEDERAL JURISDICTIONAL BASIS.

10 AND PLAINTIFFS IN THIS CASE FILED THEIR TRO IN THIS COURT,
11 THEIR APPLICATION, THE MORNING THAT THE CONTEMPT HEARING WAS
12 SET TO TAKE PLACE IN SUPERIOR COURT.

13 NOW THEY COULD HAVE SOUGHT PRELIMINARY RELIEF IN THIS
14 COURT AT ANY POINT SINCE THEY FILED THEIR COMPLAINT. THEY
15 COULD HAVE BROUGHT IT BACK IN JUNE, JULY, AUGUST, OCTOBER 27TH
16 WHEN WE FILED OUR COMPLAINT IN SUPERIOR COURT, THEY CHOSE NOT
17 TO DO SO, THEY LITIGATED THEIR FEDERAL DEFENSES IN THE STATE
18 COURT, AND NOW HAVING LOST, THEY ARE ASKING THE COURT TO SAVE
19 THEM FROM THE CHOICES THAT THEY HAVE MADE AND FROM THAT
20 DECISION. AND IT'S INAPPROPRIATE TO DO SO ON COMITY AND
21 FEDERALISM CONCERNS.

22 THE FINAL POINT IS, OF COURSE, THAT THE STATE COURT
23 PROCEEDINGS NOW INVOLVE CONTEMPT PROCEEDINGS. AND SO THE
24 INTEREST OF THE COURT, THE COURTS OF CALIFORNIA, IN VINDICATING
25 THE RULE OF LAW AND ADHERENCE TO THEIR ORDERS, IS NOW AT ISSUE,

1 WHICH MAKES IT INAPPROPRIATE FOR THIS COURT TO INTERVENE OR
2 STOP THE STATE COURT PROCEEDINGS.

3 WITH RESPECT TO --

4 THE COURT: WOULD YOU ADDRESS THE EXCEPTIONS TO
5 YOUNGER ABSTENTION, AND PARTICULARLY THE ONE EXCEPTION RAISED
6 BY MS. GONDEIRO, WHICH IS IRREPARABLE HARM.

7 MR. WALL: SO THERE IS NO -- FOR THE SAME REASONS
8 THAT THERE IS NO IRREPARABLE HARM ON THE FREE EXERCISE, THERE'S
9 NO IRREPARABLE HARM TO PLAINTIFFS HERE, THEY HAVE A FULL AND
10 FAIR OPPORTUNITY TO VINDICATE THEIR FEDERAL RIGHTS IN THE STATE
11 COURT IN RESPONSE TO THIS EX PARTE TRO APPLICATION THAT WE
12 INITIALLY FILED ON OCTOBER 28TH. THE PLAINTIFFS HAD AN
13 OPPORTUNITY TO, AND DID ASSERT THEIR FEDERAL CONSTITUTIONAL
14 RIGHTS, THEIR DEFENSES. THEY DID NOT PREVAIL ON THAT ARGUMENT.
15 THEY HAD AN ADDITIONAL CHANCE IN CONNECTION WITH THE MOTION,
16 THE APPLICATION TO REVISE THE TRO AND ON THE PRELIMINARY
17 INJUNCTION AS WELL.

18 THE COURT: SO ARE YOU SUGGESTING THAT THE
19 IRREPARABLE HARM UNDER THE YOUNGER EXCEPTION, NOT FOR THE
20 INJUNCTION, BUT UNDER THE YOUNGER EXCEPTION, IS LIMITED TO AN
21 EVALUATION OF WHETHER THE CLAIMS AND DEFENSES CAN BE BROUGHT
22 AND HAVE A FORUM TO BE BROUGHT BEFORE THE STATE?

23 MR. WALL: I DO NOT KNOW, YOUR HONOR, IF IT'S LIMITED
24 TO THAT IN EVERY CIRCUMSTANCE. I THINK THAT IS A FAIR WAY TO
25 DESCRIBE IT IN THIS CASE. THERE ARE NO OTHER EXCEPTIONAL

1 CIRCUMSTANCES THREATENING IRREPARABLE HARM THAT IS SEPARATE
2 FROM THEIR ABILITY TO LITIGATE AND VINDICATE THEIR FEDERAL
3 RIGHTS.

4 FOR EXAMPLE, THERE ARE ADMINISTRATIVE PROCEEDINGS IN WHICH
5 THE PLAINTIFFS, IN WHICH A PARTY IS NOT ABLE TO ASSERT A
6 FEDERAL CONSTITUTIONAL DEFENSE. AND IN THOSE CIRCUMSTANCES
7 WHERE A FEDERAL CONSTITUTIONAL RIGHT MAY BE IN JEOPARDY AND
8 THEY CANNOT SERVE SUCH AN OFFENSE, THERE IS AN IRREPARABLE HARM
9 THREATENED.

10 THAT IS NOT THIS CASE, THIS CASE IS AN ORDINARY COURSE
11 REGULATORY PUBLIC NUISANCE PROCEEDING, ALBEIT IN THE
12 EXCEPTIONAL CIRCUMSTANCES OF THE COVID 19 PANDEMIC, BUT A
13 PUBLIC NUISANCE PROCEEDING IN WHICH PLAINTIFF'S LITIGANTS VERY
14 OFTEN ASSERT FEDERAL DEFENSES AND THEY GET A FAIR HEARING IN
15 THE STATE COURTS.

16 THE COURT: OKAY.

17 WELL, BUT, I MEAN, MS. GONDEIRO IS CORRECT THAT UNDER --
18 IT'S NOT JUST UNDER THE NEW CASES OF THE BROOKLYN DIOCESE OR
19 THE NEW NINTH CIRCUIT CALVARY CASE THAT A PARTY CLAIMING AN
20 INFRINGEMENT OF THEIR CONSTITUTIONAL RIGHT, HERE A FIRST
21 AMENDMENT RIGHT TO FREE EXERCISE OF RELIGION, DOES MAKE A CASE
22 FOR IRREPARABLE HARM.

23 I THINK THAT WHAT MS. GONDEIRO HAS SUBMITTED AS AUTHORITY
24 IS THAT IRREPARABLE HARM, THAT COULD BE ENOUGH IN ORDER TO GET
25 A RESTRAINING ORDER, BUT NOT THE EXTRAORDINARY LEVEL NECESSARY

1 TO QUALIFY AS AN EXCEPTION TO YOUNGER ABSTENTION. THAT'S WHERE
2 I'M DRAWING THE LINE.

3 BUT MS. GONDEIRO IS COMPLETELY CORRECT THAT WHEN A
4 FUNDAMENTAL RIGHT, SUCH AS FREE EXERCISE OF RELIGION, IS AT
5 ISSUE, AND CLEARLY THESE STATE AND COUNTY REGULATIONS RIGHT
6 NOW, THE CHURCH CANNOT INVITE ANYONE INSIDE TO WORSHIP, IT'S A
7 ZERO OCCUPANCY, IS MY UNDERSTANDING, SO I'M TRYING TO FIND WHAT
8 IS NEEDED FOR YOUNGER ABSTENTION, BECAUSE AS I QUESTIONED
9 MS. GONDEIRO ABOUT THIS, IT'S NOT -- I DON'T THINK IT'S ENOUGH
10 TO BE JUST THE STANDARD IRREPARABLE HARM NECESSARY IN ORDER TO
11 OBTAIN A PRELIMINARY INJUNCTION.

12 MR. WALL: THAT'S CORRECT, YOUR HONOR.

13 IT NEEDS TO BE EXTRAORDINARY CIRCUMSTANCES. AND WHAT WE
14 HAVE HERE ARE PARALLEL PROCEEDINGS IN STATE AND FEDERAL COURT,
15 TO WHICH WE SHOULD APPLY ORDINARY COMITY AND FEDERALISM
16 PRINCIPLES AND NOT INTERFERE IN THE STATE COURT PROCEEDING,
17 UNTIL AT WHICH POINT IT INTERFERES WITH THIS PROCEEDING AND WE
18 ARE NOT AT THAT STAGE YET, IF WE WILL EVER GET THERE.

19 MOVING ON, YOUR HONOR, TO THE FREE EXERCISE CLAIM.
20 PLAINTIFFS CITE TWO CASES IN THEIR REPLY BRIEF, ROMAN CATHOLIC
21 AND CALVARY CHAPEL DAYTON VALLEY IN SUPPORT OF THEIR ARGUMENT
22 THAT THERE'S A FREE EXERCISE ISSUE HERE, NEITHER OF WHICH WE
23 BELIEVE CONTROLS THIS CASE AND NEITHER OF WHICH ADDRESSES THE
24 ISSUE BEFORE THIS COURT ON THE FACTUAL RECORD THAT WE HAVE
25 HERE.

1 IN ROMAN CATHOLIC, THE SUPREME COURT ADDRESSED NEW YORK
2 STATE'S HEALTH ORDERS, CITING LUKUMI. AND THE COURT FOUND THAT
3 THOSE ORDERS, THAT THERE WAS FOR TWO REASONS THAT THEY VIOLATED
4 THE NEUTRALITY PRINCIPLE.

5 THE FIRST REASON WAS THAT THERE WAS EVIDENCE THAT THERE
6 HAD BEEN A TARGETING OF PARTICULAR RELIGIOUS COMMUNITY IN THE
7 WAYS THAT THE LINES WERE DRAWN, AND IN THE STATEMENTS OF THE
8 GOVERNOR. NOW WHILE NOT DISPOSITIVE OF A NEUTRALITY ISSUE,
9 THEY WERE NONETHELESS CONSIDERATIONS THAT THE COURT DISCUSSES
10 IN ITS OPINION AND PRO CURIUM OPINION.

11 THE SECOND POINT IS THE STRIKING DISPARITY, THEY USED THAT
12 TERM, BETWEEN THE TREATMENT OF CHURCHES IN THE STATE AND THE
13 TREATMENT OF SECULAR ACTIVITIES.

14 SO FOR EXAMPLE, THE ATTENDANCE AT CHURCHES IN THAT CASE
15 MIGHT HAVE BEEN CAPPED AT 10 OR 25 PEOPLE AS COMPARED TO
16 UNLIMITED CAPACITY ATTENDANCE AT AN ESSENTIAL, AND EVEN
17 NONESENTIAL, BUSINESSES AND ACTIVITIES IN THE STATE. WE DON'T
18 HAVE THAT DISPARITY HERE.

19 TO CLARIFY ONE THING FOR THE COURT, THE CURRENT STATE, IT
20 IS A DIFFICULT REGULATORY ENVIRONMENT TO UNDERSTAND BECAUSE THE
21 PUBLIC HEALTH ORDERS HERE HAVE BEEN CHANGING ON A FREQUENT
22 BASIS, AND WE HAVE THE OVERLAPPING AND SOMETIMES, THE
23 OVERLAPPING REQUIREMENTS OF STATE AND COUNTY PUBLIC HEALTH
24 ORDERS.

25 THE CURRENT ORDERS ARE IN THE RECORD ATTACHED TO

1 MR. AVILA'S DECLARATION. THE RISK REDUCTION ORDER, DATED
2 OCTOBER 5TH FROM THE COUNTY, IS EXHIBIT A.

3 THE COURT: DID YOU SAY H, LIKE HARRY?

4 MR. WALL: EXHIBIT A, AS IN APPLE, YOUR HONOR.

5 THE COURT: OKAY. THANK YOU.

6 MR. WALL: THE EXHIBIT B IS THE MANDATORY DIRECTIVE
7 IMPLEMENTING THE STATE'S REGIONAL STAY-AT-HOME ORDER. SO WHAT
8 HAPPENED THERE ON DECEMBER 4TH, THE STATE ISSUED ITS MANDATORY
9 DIRECTIVE, THE STATE REGIONAL STAY-AT-HOME ORDER THAT CARVED
10 THE STATE UP INTO ICU CAPACITY REGIONS AND SAID, WHEN YOUR
11 REGION DROPS BELOW 15 PERCENT ICU CAPACITY, THE TERMS OF THE
12 ORDER APPLY.

13 WHEN THE STATE ISSUED THAT ORDER, NOTWITHSTANDING THE FACT
14 THAT THE BAY AREA REGION WAS NOT YET AT 15 PERCENT ICU
15 CAPACITY, WHICH IT GOT TO YESTERDAY, UNFORTUNATELY.

16 THE COURT: I KNOW.

17 MR. WALL: BUT NOTWITHSTANDING THE FACT THAT WE WERE
18 NOT THERE YET, WE WERE ALREADY THERE IN SANTA CLARA COUNTY.

19 AND GIVEN THE NUMBER OF CASES, THE INCREASE IN THE CASE
20 COUNT AND THE STRESS ON THE HOSPITALS AND CRITICAL CARE
21 FACILITIES IN THE COUNTY, OUR PUBLIC HEALTH OFFICER AND FOUR
22 OTHER OFFICERS IN THE BAY AREA IMPLEMENTED THAT STATE ORDER
23 EARLY BEFORE WE WERE ACTUALLY EXPECTED AND BEFORE WE GOT BELOW
24 THE 15 PERCENT. THAT'S EXHIBIT B.

25 THE COURT: SO ONE OF MY CONCERNS, AND WHY I ASKED

1 MS. GONDEIRO TO HELP ME OUT, IS THAT THERE'S ALWAYS A LAG TIME
2 HERE.

3 AND SO HER -- I NEED TO KNOW WHAT ORDERS, WHAT PUBLIC
4 HEALTH ORDERS SHE IS ASKING ME TO REVIEW, IF I GET THERE. AND
5 THESE -- THE REGIONAL ORDER, I THINK CAME IN TO EXISTENCE AFTER
6 THE FACTS OF THIS CASE, BECAUSE JUDGE KERWIN'S ORDER OF
7 CONTEMPT AND HIS PRELIMINARY INJUNCTION ORDER HAVE NOTHING TO
8 DO WITH THE REGIONAL ORDER; ISN'T THAT CORRECT?

9 MR. WALL: I THINK -- SO IT'S OUR UNDERSTANDING THAT
10 THE PRELIMINARY INJUNCTION ORDER IMPLEMENTS THE REVISED TRO
11 DATED NOVEMBER 24TH, WHICH IS ATTACHED AS THE TRO EXHIBIT C.

12 THE FIRST TERM OF THE TEMPORARY RESTRAINING ORDER
13 PROHIBITS PLAINTIFFS FROM CONDUCTING ANY GATHERING THAT DOES
14 NOT FULLY COMPLY WITH STATE AND COUNTY PUBLIC HEALTH ORDERS.

15 THE COURT: OH.

16 MR. WALL: INCLUDING, AND THEN IT SPECIFIES THE THEN
17 CURRENT ORDERS. BUT THAT FIRST TERM, IN OUR VIEW, OBLIGATES
18 CALVARY AND PASTOR MCCLURE TO FOLLOW THE RULES AS THEY CHANGE.

19 THE COURT: CHANGE.

20 MR. WALL: AND OF COURSE SHOULD THEY HAVE -- SO FOR
21 EXAMPLE, PRETEND ON NOVEMBER 24TH, THIS IS NOT THE CASE, BUT
22 THE PLAINTIFFS BELIEVED THAT THE ORDERS WERE CONSTITUTIONAL AND
23 THEY WERE HAPPY TO ACCEPT THEM AND LIVE WITH THEM. BUT THEN AT
24 SOME SUBSEQUENT DATE, THE STATE AND/OR THE COUNTY HAD ISSUED
25 ORDERS WITH WHICH THEY DISAGREED. AT THAT POINT THEY COULD

1 SEEK RELIEF FROM JUDGE KIRWAN, ASK FOR A MODIFICATION OF RELIEF
2 FROM HIS PRELIMINARY INJUNCTION ORDER, GIVEN THE CHANGE IN THE
3 RULES.

4 AND AS YOU'VE SEEN, THE SUPERIOR COURT HAS BEEN ABLE TO
5 ACT VERY QUICKLY ON OUR EX PARTE APPLICATIONS, AND AT THE SAME
6 TIME, IT AFFORDED PLAINTIFFS CALVARY AND MCCLURE AN ADEQUATE
7 OPPORTUNITY TO RAISE THEIR DEFENSES.

8 SO FOR THE PURPOSES, I THINK OF CONSIDERING, IF THE COURT
9 WERE TO REACH, I DON'T THINK IT SHOULD OR NEEDS TO, IF THE
10 COURT WERE TO CONSIDER THE CONSTITUTIONALITY OF THE CURRENT
11 ORDERS APPLICABLE TO CALVARY AND TO PASTOR MCCLURE, THEY SHOULD
12 LOOK TO, AND I'M GOING TELL YOU WHERE THEY ARE IN THE RECORD
13 RIGHT NOW. SO IT'S EXHIBITS A AND B TO THE AVILA DECLARATION
14 WHICH IS AT ECF 56. AND AGAIN, THAT'S THE RISK REDUCTION ORDER
15 FROM THE COUNTY, AND IT'S A MANDATORY DIRECTIVE IMPLEMENTING
16 THE STATE'S REGIONAL STAY-AT-HOME ORDER.

17 THEN THE CURRENT DIRECTIVE ON GATHERINGS IS EXHIBIT E, AS
18 IN ELEPHANT, TO THAT DECLARATION. AND IT WAS LAST REVISED
19 DECEMBER 4TH.

20 FOURTH, THE MANDATORY DIRECTIVE ON CAPACITY LIMITATIONS,
21 THE CURRENT VERSION IS EXHIBIT G, AS IN GIRAFFE, TO THAT
22 DECLARATION. AND AGAIN, IT WAS REVISED ON DECEMBER 4TH.

23 AND THEN THE STATE ORDERS AND GUIDANCE ARE ATTACHED AS
24 EXHIBITS H THROUGH K, OF THE SAME DECLARATION, ALTHOUGH
25 MR. GRABARSKY MAY HAVE MORE INFORMATION FOR YOUR HONOR AS TO

1 THE STATE OF THE ART WITH RESPECT TO THOSE ORDERS.

2 THE COURT: OKAY. ARE THOSE ARE ALL THE ORDERS?
3 BECAUSE I WANT TO MAKE A POINT TO MS. GONDEIRO. IS THAT ALL
4 THE ORDERS THAT YOU THINK ARE --

5 MR. WALL: I THINK SO, YOUR HONOR.

6 THE COURT: OKAY.

7 MS. GONDEIRO, I WANT TO MAKE YOUR JOB EASY. I'M GOING TO
8 RECOMMEND THAT YOU LOOK AT THE DOCUMENTS THAT ARE ATTACHED TO
9 THE AVILA DECLARATION, AND IF YOU AGREE THAT THESE ARE THE ONES
10 I SHOULD LOOK AT, THAT'S ALL YOU NEED TO TELL ME, OKAY.

11 MS. GONDEIRO: OKAY.

12 THE COURT: YOU CAN'T DO IT NOW BECAUSE YOU WANT TO
13 STUDY THOSE. AND YOU ARE GOING TO NEED TO FILE FOR ME EITHER
14 THE DOCUMENTS OR A ONE-LINE STATEMENT THAT YOU CONCUR THAT
15 EXHIBITS A, B, E, G, AND H THROUGH K ARE THE RELEVANT ORDERS AT
16 ISSUE.

17 THAT WILL MAKE YOUR JOB EASY IF YOU AGREE WITH THAT, OKAY.

18 MS. GONDEIRO: THANK YOU SO MUCH.

19 MR. WALL: AND IN THAT CONNECTION, WHILE WE ARE
20 TALKING ABOUT THE CHANGING ORDERS OVER TIME, YOUR HONOR, I JUST
21 WANT TO ANSWER THE COURT'S QUESTION ABOUT CALVARY CHAPEL IN THE
22 NINTH CIRCUIT DECISION WHERE THEY ENJOINED ANY GREATER CAPACITY
23 LIMITATION THAN 25 PERCENT.

24 IN THAT CASE, THE COURT WAS CONSIDERING THE
25 CONSTITUTIONALITY OF THE NEVADA RULES AND AGAIN PROPOSED A

1 STRIKING AND EXTREME DISPARITY BETWEEN CHURCH AND CASINO AND
2 OTHER LOCATION ATTENDANCE, WHERE CHURCHES MIGHT BE LIMITED TO
3 50 PEOPLE AND CASINOS COULD OPERATE AT 50 PERCENT, AGAIN, A
4 STRIKING DISPARITY. AND THEN THEY WENT ON TO APPLY A
5 25 PERCENT CAPACITY LIMIT IN THE INJUNCTIVE RELIEF, ALTHOUGH IT
6 WASN'T COMPLETE INJUNCTIVE RELIEF BECAUSE THEY RESERVED THE
7 QUESTION OF THE EQUITIES TO THE DISTRICT COURT WHEN THEY
8 REMANDED THAT -- WHEN THEY REMANDED THE CASE TO ISSUE
9 INJUNCTIVE RELIEF.

10 WHICH I THINK IS AN IMPORTANT POINT, AND I WILL TALK ABOUT
11 IT IN A MINUTE WHEN I GET TO THE FREE EXERCISE CLAIM.

12 I THINK WHAT IS GOING ON THERE, YOUR HONOR, IS THAT THEY
13 WERE EVALUATING THE CONSTITUTIONALITY OF THE REGULATIONS IN
14 PLACE WHEN THE COMPLAINT WAS FILED AND THE TRO APPLICATION WAS
15 FILED IN THAT ACTION, AND THEN WHAT THEY WERE DOING WAS
16 IMPOSING THE 25 PERCENT LIMITATION THAT WAS THEN APPLICABLE TO
17 CASINOS, RETAIL OPERATIONS AND OTHER FACILITIES IN THE STATE.

18 IT IS NOT CLEAR AND THEY DO NOT EXPLAIN IT AND, YOU KNOW,
19 THERE'S -- OVERALL, THAT DECISION DOES NOT HAVE A GREAT DEAL OF
20 ANALYSIS AND I DON'T THINK IT'S HELPFUL FOR THIS COURT IN
21 ADDRESSING THE FREE EXERCISE DECISION BEFORE THAT, AND I WILL
22 EXPLAIN THAT NOW.

23 SO NOT ONLY IS ROMAN CATHOLIC DISTINGUISHABLE BECAUSE
24 THERE IS NO EVIDENCE THAT WE TARGETED RELIGIOUS COMMUNITIES
25 HERE AND THERE'S NO STRIKING DISPARITY BETWEEN THE TREATMENT OF

1 CHURCHES, GATHERINGS INCLUDING CHURCHES, AND SECULAR
2 ACTIVITIES.

3 SO FOR EXAMPLE, UNDER THE CURRENT RULES, THERE IS A
4 PROHIBITION ON INDOOR GATHERINGS, AND THAT INCLUDES GATHERINGS
5 AT CHURCHES. THERE IS A 20 PERCENT CAPACITY LIMITATION FOR
6 GROCERY STORES AND RETAIL ACTIVITY AND OTHER ACTIVITIES. AND I
7 WOULD SAY THAT DISPARITY IS NOT STRIKING, IT'S NOT OF THE SAME
8 MAGNITUDE AS EITHER THE ROMAN CATHOLIC DECISION, WHICH WAS 10
9 TO 25 PEOPLE VERSUS UNLIMITED FOR SECULAR ACTIVITIES, OR THE --

10 THE COURT: I THOUGHT THAT TODAY, THE STANDALONE
11 GROCERY STORES WERE AT 35 PERCENT.

12 MR. WALL: SO THAT IS UNDER -- SO HERE AGAIN, THE
13 COMPLICATED NATURE OF THIS REGULATORY ENVIRONMENT. THE STATE
14 RULE CURRENTLY PERMITS 35 PERCENT OCCUPANCY FOR GROCERY STORES.
15 SANTA CLARA COUNTY HAS A MORE RESTRICTIVE SUPERSEDING RULE THAT
16 LIMITS IT TO 20 PERCENT, AND THAT'S IN THE CAPACITY DIRECTIVE
17 THAT I -- THAT IS AT EXHIBIT G AS IN GIRAFFE TO MR. AVILA'S
18 DECLARATION.

19 THE COURT: THAT IS HELPFUL. THANK YOU.

20 MR. WALL: IN THE COUNTY -- SO BETWEEN ZERO AND
21 20 PERCENT.

22 AND THE COUNTY -- AS WE LAY OUT IN OUR BRIEF, THE COUNTY
23 TREATS SIMILAR ACTIVITIES SIMILARLY. SO FOR EXAMPLE, ALL
24 GATHERINGS WHICH WOULD BE LONGER DURATION INDOOR GATHERINGS,
25 SOCIAL GATHERINGS, RELIGIOUS GATHERINGS, ARE TREATED THE SAME

1 WAY, WHETHER IT'S IN A CHURCH, WHETHER IT'S IN A LECTURE HALL,
2 WHETHER IT'S IN A SCHOOL AUDITORIUM. THOSE ARE TREATED THE
3 SAME. YOU CAN'T GATHER IN THESE PLACES.

4 THE COURT: SO THAT IS CERTAINLY THE PREMISE ON WHICH
5 THE COUNTY ORDINANCE IS BASED. BUT IN ROMAN CATHOLIC, I READ
6 THE OPINION, AND ESPECIALLY IN THE CALVARY DECISION FROM THE
7 NINTH CIRCUIT, AS ESSENTIALLY SAYING IF ANY ACTIVITY HAS A
8 HIGHER OCCUPANCY. AND IT CAN BE AN ESSENTIAL ACTIVITY THAT
9 THAT LINE, THAT CHURCHES AND OTHER HOUSES OF WORSHIP CANNOT BE
10 TREATED DIFFERENTLY THAN THE MOST GENEROUS ALLOCATION TO ANY
11 SERVICE, ESSENTIAL OR OTHERWISE.

12 MR. WALL: THE ISSUE HERE IS THE QUESTION AS TO
13 WHETHER THE RULES, THE STATE AND COUNTY RULES, ARE NEUTRAL AND
14 OF GENERAL APPLICABILITY, WHICH IS THE STANDARD STATE OF
15 LUKUMI, WHICH IS THE STANDARD APPLIED BY THE SUPREME COURT IN
16 ROMAN CATHOLIC.

17 THE ROMAN CATHOLIC, I WOULD ARGUE THAT THEY HAD -- ON
18 THOSE FACTS, IT WAS AN EASIER DECISION, WHERE THEY HAD EVIDENCE
19 THAT THERE WAS RELIGIOUS GERRYMANDERING TARGETING A SPECIFIC
20 RELIGIOUS COMMUNITY AND THERE WAS A STRIKING DISPARITY IN
21 TREATMENT BETWEEN CHURCHES AND SECULAR SPACES.

22 WE HAVE NEITHER OF THOSE HERE. SO THOSE FACTS THAT WERE
23 APPLICABLE IN ROMAN CATHOLIC DON'T TELL US WHETHER OUR RULES
24 HERE ARE NEUTRAL. OUR RULES HERE ARE BASED ON THE RISK PROFILE
25 OF THE ACTIVITIES IN QUESTION.

1 AND SO FOR EXAMPLE, WE HAVE PROVIDED EVIDENCE SUBMITTED
2 WITH -- THE DECLARATION FROM DR. LIPSITCH FROM DR. CODY, THE
3 HEALTH OFFICER IN THE COUNTY, AND THE STATE'S DR. STOTO THAT WE
4 ATTACHED TO MR. AVILA'S DECLARATION THAT GATHERINGS PRESENT A
5 GREATER RISK OF COVID 19 TRANSMISSION AND ARE MORE DANGEROUS
6 THAN OTHER ACTIVITIES.

7 SO FOR EXAMPLE, DR. CODY EXPLAINS THAT THE DURATION AND
8 PROXIMITY OF INTERPERSONAL CONTACT IS RELEVANT FOR COVID 19
9 TRANSMISSION AND INCREASES THE RISK. THAT'S AT PARAGRAPHS 11
10 AND 18 OF HER DECLARATION.

11 BOTH DOCTORS CODY AND LIPSITCH EXPLAIN THAT THE DURATION
12 OF INTERPERSONAL CONTACT IS RELEVANT. AND THAT'S AT
13 PARAGRAPH 47 AND 53 OF DR. CODY'S DECLARATION. AND PARAGRAPHS
14 39 AND 40 OF DR. LIPSITCH'S DECLARATION. BOTH DOCTORS
15 EXPLAINED THAT INDOOR ACTIVITIES ARE MORE DANGEROUS, AND THAT'S
16 CODY AT PARAGRAPH 33 TO 36, AND DR. LIPSITCH AT PARAGRAPH 38.
17 THAT THE SIZE OF THE GATHERING IS RELEVANT. AND AGAIN, THAT'S
18 DR. CODY AT PARAGRAPH 36, AND DR. LIPSITCH AT PARAGRAPH 41.

19 AND SPECIFICALLY WITH RESPECT TO INDOOR GATHERING, LIKE
20 CHURCH SERVICES AND LECTURES AT UNIVERSITIES AND INDOOR BAR
21 GATHERINGS, DR. CODY PROVIDES NUMEROUS EXAMPLES OF OUTBREAKS
22 THAT HAVE BEEN TIED TO THOSE ACTIVITIES VIA CONTACT TRACING,
23 AND THAT'S AT PARAGRAPH 40 OF HER DECLARATION.

24 WHAT IS BEFORE THE COURT IS A FACTUAL RECORD THAT SHOWS
25 THAT INDOOR GATHERINGS OF LONGER DURATION AND CLOSER SOCIAL

1 CONTACT ARE MORE DANGEROUS DURING THE PANDEMIC THAN OTHER
2 ACTIVITIES. AND THAT IS THE LINE THAT WE HAVE DRAWN HERE.

3 SO I WOULD STATE THAT IT CANNOT BE THE CASE THAT CALVARY
4 CHAPEL, THE NINTH CIRCUIT DECISION, AND ROMAN CATHOLIC STAND
5 FOR THE PROPOSITION THAT CHURCHES HAVE TO BE TREATED THE SAME
6 WAY AS ANY OTHER ACTIVITY.

7 AND ONE SHINING EXAMPLE AND PRINCIPAL EXAMPLE IS
8 HOSPITALS. HOSPITALS TODAY ARE OPERATING AT OVER ONE
9 HUNDRED PERCENT CAPACITY BECAUSE THEY ARE DEALING WITH THE
10 PANDEMIC AND THEY ARE DEALING WITH A SERIOUS ILLNESS AND THE
11 HOSPITALIZATIONS THAT ARE NECESSARY TO DEAL WITH THE SERIOUS
12 CASES. IT CANNOT BE THE CASE THAT BECAUSE HOSPITALS ARE
13 TREATED DIFFERENTLY THAN CHURCHES, THAT CHURCHES NEED TO BE
14 ABLE TO OPERATE AT ABOVE ONE HUNDRED PERCENT CAPACITY.

15 AND THE DIFFERENCE IS, OF COURSE, THAT THERE'S A SECULAR
16 REASON FOR TREATING HOSPITALS DISTINCTLY FROM GATHERINGS, WHICH
17 IS THAT THEY ARE NECESSARY FOR THE CRITICAL CARE OF THE SICK
18 AND ILL MEMBERS OF OUR COMMUNITY, WHETHER IT'S FROM COVID 19
19 WHICH CONTRIBUTED 99 NEW CASES TO OUR HOSPITALS IN THE COUNTY
20 YESTERDAY, OR WHETHER IT'S THE OTHER ILLNESSES, ACCIDENTS AND
21 PROBLEMS THAT BRING PEOPLE IN FOR CRITICAL MEDICAL CARE.

22 THE LINES THAT THE STATE AND COUNTY HAVE DRAWN HERE ARE
23 DRAWN ON A SIMILAR SECULAR BASIS, WHICH IS THE RISK PROFILE OF
24 THE ACTIVITIES AT ISSUE.

25 NOW NEITHER ROMAN CATHOLIC NOR CALVARY CHAPEL IN THE

1 NINTH CIRCUIT DISCUSS WHETHER THAT IS AN APPROPRIATE
2 DISTINCTION OR PROVIDE, UNFORTUNATELY, ANY GUIDANCE TO THIS
3 COURT ON HOW TO EVALUATE THAT EVIDENCE IN THE CONTEXT OF THE
4 FREE EXERCISE CLAIM.

5 SO WITH RESPECT TO THAT QUESTION, I BELIEVE THIS COURT IS
6 OPERATING ON A BLANK SLATE, IS NOT CONTROLLED BY EITHER ROMAN
7 CATHOLIC OR THE CALVARY CHAPEL DECISION IN THE NINTH CIRCUIT,
8 AND SHOULD RETURN TO -- SHOULD APPLY THE TRADITIONAL METHODS OF
9 ANALYSIS FOR A FREE EXERCISE CLAIM, WHICH WERE NOT OVERTURNED
10 AND WERE IN FACT ENDORSED BY THE CITATION OF LUKUMI AND THE
11 PROCURING OPINION IN ROMAN CATHOLIC, AND CONSIDER WHETHER OR
12 NOT THE RULES HERE ARE NEUTRAL AND OF GENERAL APPLICABILITY.

13 AND ON THE FACTUAL RECORD BEFORE THIS COURT, I MAINTAIN
14 THE COURT SHOULD CONCLUDE THAT THE STATE AND COUNTY'S RESPONSE
15 TO THE PANDEMIC IN ISSUING THESE PUBLIC HEALTH RULES WAS
16 PROPORTIONAL TO THE RISK AND APPROPRIATE.

17 SO WHERE ACTIVITIES PRESENTED A GREATER RISK OF COMMUNITY
18 TRANSMISSION, SERIOUS ILLNESS AND DEATH RELATED TO COVID 19,
19 THE STATE AND COUNTY PLACED GREATER RESTRICTIONS. WHERE THE
20 ACTIVITIES DON'T PRESENT THE SAME RISK AND A LESSER RISK, THEY
21 IMPLEMENT LESSER RESTRICTIONS. AND THAT IS A NEUTRAL AND
22 GENERALLY APPLICABLE RULE THAT DOES INCIDENTALLY BURDEN
23 GATHERINGS IN CHURCHES BUT DOES NOT MERIT STRICT SCRUTINY.

24 A FURTHER POINT HERE JUST TO CLARIFY WHAT IS HAPPENING
25 WITH RESPECT TO THE PLAINTIFFS, THE COUNTY DOESN'T REGULATE

1 CHURCHES. ACTIVITY IN CHURCHES, IT REGULATES GATHERINGS. AND
2 SO ACTIVITIES IN CHURCHES AREN'T SHUT DOWN. SO THE
3 ADMINISTRATIVE ACTIVITIES IN A CHURCH CAN CONTINUE AT THE
4 20 PERCENT CAPACITY LIMIT THAT ANY OTHER BUSINESS ALLOWED
5 ACTIVITY WOULD BE ABLE TO CONDUCT IN THE COUNTY.

6 WHAT YOU CAN'T DO IS GATHER AT THE CHURCH. AND THAT'S FOR
7 THE SPECIFIC EPIDEMIOLOGICAL CONCERNS THAT LARGE GATHERINGS,
8 WHERE THERE IS BROAD COMMUNITY TRANSMISSION OF THE VIRUS, ARE
9 LIKELY TO INCLUDE PEOPLE WHO ARE POSITIVE FOR COVID 19, WHO ARE
10 LIKELY INFECTIOUS, AND WHERE THE GATHERING YOU ARE GOING TO
11 ENGAGE IN ACTIVITIES, IN THIS CASE LIKE SINGING AND CHANTING,
12 NOT WEARING MASKS, NOT SOCIAL DISTANCING, WHICH ARE VERY LIKELY
13 TO SPREAD THE DISEASE AND CAUSE ILLNESS AND DEATH IN OUR
14 COMMUNITY.

15 AND I THINK THAT'S WHY WERE THE COURT, TO REACH THE FREE
16 EXERCISE QUESTION, THAT'S THE ANALYSIS IT SHOULD APPLY AND
17 SHOULD FIND THAT THESE ARE NEUTRAL AND GENERALLY APPLICABLE
18 RULES.

19 AND THE REASONABLENESS OF THE RULES THAT THE STATE AND
20 COUNTY HAVE IMPLEMENTED ARE SUPPORTED BY DR. MARK LIPSITCH, WHO
21 IS ONE OF THE WORLD'S PREEMINENT EXPERTS ON INFECTIOUS DISEASE
22 AND PANDEMIC RESPONSE. AND IN HIS DECLARATION HE CONCLUDES
23 THAT "WHERE REGIONS ARE EXPERIENCING MODERATE, HIGH OR
24 INCREASING LEVELS OF COMMUNITY TRANSMISSION," WHICH
25 UNFORTUNATELY DESCRIBES BOTH THE STATE'S AND COUNTY, "THAT

1 LOCAL AUTHORITIES SHOULD CLOSE OFF INDOOR SPACES AS APPROPRIATE
2 AND REQUIRE UNIVERSAL MASK USE."

3 UNFORTUNATELY, PLAINTIFF CALVARY AND PASTOR MCCLURE HAVE
4 IGNORED THE RULES THAT REQUIRED THEM TO DO THIS AND DON'T
5 APPEAR TO APPRECIATE THEIR IMPORTANCE IN PROTECTING THE REST OF
6 THE COMMUNITY FROM ILLNESS AND DEATH.

7 DR. LIPSITCH, IN PARAGRAPH 46, CONCLUDES "IT WOULD BE
8 RECKLESS TO LIFT THOSE RESTRICTIONS NOW, GIVEN THE CASE COUNTS
9 AND HOSPITALIZATION RATES THAT THE COUNTY AND THE STATE ARE
10 EXPERIENCING."

11 I MEAN, THE COUNTY IS NOW BELOW 15 PERCENT ICU CAPACITY.
12 STANFORD -- I UNDERSTAND THE STANFORD MEDICAL FACILITIES HAVE
13 NO NON-SURGE CAPACITY LEFT. WE ARE AT A VERY DIFFICULT POINT
14 IN THE PANDEMIC. AS YOU MENTIONED, THERE IS HOPE AROUND THE
15 CORNER, GIVEN THE AVAILABILITY OF EFFECTIVE VACCINES, BUT THAT
16 HOPE IS STILL MONTHS AWAY FROM BEING REALIZED. AND IN THE
17 INTERIM, TO THE EXTENT THAT WE CAN AVOID ILLNESS AND WE CAN
18 AVOID DEATH, WE MIGHT PREVENT THEM ALL TOGETHER.

19 I WILL POINT THE COURT TO ONE DECISION, IT'S NOT CITED IN
20 THE BRIEFS, IT WAS ISSUED ON NOVEMBER 29TH, AND THAT'S
21 COMMONWEALTH V. BESHEAR, IT'S IN THE SIXTH CIRCUIT, IT'S
22 OBVIOUSLY NOT BINDING ON THIS COURT, BUT IT'S A CASE IN WHICH
23 THE CIRCUIT COURT UPHELD A SET OF HEALTH ORDERS POST-ROMAN
24 CATHOLIC. AND IT EMPHASIZED THERE THAT THE TREATMENT OF
25 SIMILARLY SITUATED ENTITIES IN COMPARABLE WAYS SERVES PUBLIC

1 HEALTH INTERESTS AT THE SAME TIME IT PRESERVES BED ROCK FREE
2 EXERCISE GUARANTEES.

3 THE COURT: CAN YOU GIVE ME THAT CITE AGAIN.

4 MR. WALL: I'M SORRY, IT'S WESTLAW CITE 2020
5 WL7017858. AND IT EMPHASIZES WHAT THE STATE AND COUNTY HAVE
6 DONE, WHICH IS TO TREAT SIMILAR ACTIVITIES SIMILARLY, TREAT
7 DIFFERENT THINGS DIFFERENTLY, AND TO EMPHASIZE THE REQUIREMENT
8 THAT THIS COURT ENGAGE IN THAT FACTUAL INQUIRY ON THE RECORD
9 BEFORE IT, THREE TIMES SINCE THE SUPREME COURT ISSUED ROMAN
10 CATHOLIC DIOCESE, IT HAS REMANDED FREE EXERCISE CLAIMS BACK TO
11 THE DISTRICT COURT FOR CONSIDERATION OF ROMAN CATHOLIC ON THE
12 FACTS IN THOSE COURTS.

13 AND YOU KNOW, THAT INCLUDES THE HARVEST ROCK CASE HERE IN
14 CALIFORNIA. IT ALSO INCLUDES, I DON'T KNOW IF I HAVE THE
15 CITATIONS FOR THE TWO OTHER CASE, I BELIEVE A NEW JERSEY CASE,
16 AND I'M FORGETTING WHERE THE THIRD CASE IS, BUT THREE CASES
17 HAVE BEEN REMANDED TO DISTRICT COURT FOR CONSIDERATION ON THE
18 FACTS. AND THAT'S WHAT THE COURT WOULD HAVE TO DO HERE TO
19 REACH THE FREE EXERCISE ISSUES.

20 THE COURT: JUST AS A POINT OF CLARIFICATION AGAIN, I
21 ACTUALLY DON'T THINK I'M GOING TO REACH THIS ISSUE, BUT
22 MS. GONDEIRO ARGUES THAT CARD ROOMS OR CASINOS ARE TREATED
23 DIFFERENTLY THAN HOUSES OF WORSHIP. AND ONE OF HER DECLARANTS
24 HAS SUBMITTED PHOTOGRAPHS OF A GATHERING OF 300 PEOPLE. BUT MY
25 QUESTION FOR YOU IS, IS SHE CORRECT THAT GATHERINGS DOES NOT

1 INCLUDE CARD ROOMS?

2 MR. WALL: CARD ROOMS AREN'T REGULATED AS GATHERINGS.

3 THE COURT: OKAY.

4 MR. WALL: AND CARD ROOMS -- UNDER THE CURRENT RULES,
5 THEY ARE CLOSED, AS ARE GYMS. THERE WAS A POINT IN TIME AT
6 WHICH CARD ROOMS HAD INDOOR CAPACITY UNDER THE STATE AND COUNTY
7 RULES THAT I BELIEVE 25 PERCENT FOR A COUPLE WEEKS IN OCTOBER
8 AND NOVEMBER. THAT IS NO LONGER THE CASE AND THEY ARE NOW
9 CLOSED.

10 THE RECENT CAPACITY DIRECTIVE HAS A TABLE THAT SHOWS WHAT
11 IS OPEN AND WHAT IS CLOSED AND THE PERCENTAGES AT WHICH THINGS
12 ARE OPEN. AND UNFORTUNATELY, GIVEN THE DIRE STATE OF THE
13 PANDEMIC IN THE COUNTY AND THE STATE, MOST THINGS ARE CLOSED,
14 AND ANYTHING THAT'S OPEN IS OPEN AT 20 PERCENT, WITH A COUPLE
15 EXCEPTIONS, LIKE HOSPITALS, AND IT'S ALL LAID OUT IN THAT
16 TABLE. AGAIN, THAT WAS EXHIBIT G, AS IN GIRAFFE, TO
17 MR. AVILA'S DECLARATION.

18 FINALLY, WITH RESPECT TO THE ESTABLISHMENT CLAUSE, THERE
19 ARE THREE FACTORS ON THE LIMIT TEST. FIRST, A SECULAR PURPOSE,
20 PREVENTING ILLNESS AND DEATH THAT COVID 19 CAUSES AND REDUCING
21 TRANSMISSION, SLOWING THE PANDEMIC, IS CLEARLY A SECULAR
22 PURPOSE IN WHICH ROMAN CATHOLIC AGREES WITH AND WHICH WE ALL
23 AGREE WITH AND PLAINTIFFS AGREE WITH.

24 THE SECOND POINT IS THAT THE REGULATION CAN'T HAVE THE
25 PRINCIPLE OR PRIMARY FACT THAT IT ADVANCES OR DISAPPROVES

1 RELIGION. AGAIN, THESE ARE NEUTRAL AND GENERALLY APPLICABLE
2 RULES, PUBLIC HEALTH RULES, BASED ON RISK ASSESSMENTS OF COVID
3 19 TRANSMISSION. THEY AFFECT SECULAR INDOOR GATHERINGS AS MUCH
4 AS THEY AFFECT INDOOR RELIGIOUS GATHERINGS. THEY DON'T
5 FOCUS -- THEY DON'T SINGLE OUT RELIGIOUS GATHERINGS FOR ANY
6 DIFFERENT TREATMENT, AND THEY OBVIOUSLY NEITHER ADVANCE OR
7 DISAPPROVE OF RELIGION.

8 THE THIRD POINT, WHICH IS THE POINT THAT PLAINTIFFS,
9 CALVARY AND PASTOR MCCLURE PRINCIPALLY CONTEST, IS THAT SOMEHOW
10 THE REGULATIONS FOSTER EXCESSIVE GOVERNMENTAL ENTANGLEMENT WITH
11 RELIGION. THEY CITE LEMON IN SUPPORT OF THAT.

12 THE CASE IN LEMON WAS DIFFERENT. LEMON INSTRUCTS US THAT
13 YOU CAN -- MONITORING CAN ENTANGLE THE GOVERNMENT IN RELIGIOUS
14 AFFAIRS WHERE THE SURVEILLANCE OR THE MONITORING IS NECESSARY,
15 AND THIS IS FROM THE DECISION ON PAGE 620 TO 21, "IS NECESSARY
16 TO ENSURE THAT TEACHERS THERE PLAY A STRICTLY NON-IDEOLOGICAL
17 ROLE."

18 AND SO THERE, THE GOVERNMENT SURVEILLANCE WAS TO ENSURE
19 THAT WHEN TEACHERS DID THEIR JOBS, THEY WERE NON-IDEOLOGICAL,
20 HAD TO GO INTO THE CONTENT OF WHAT WAS TAUGHT, THE CONTENT OF
21 WHAT THE TEACHERS WERE SAYING, AND EVALUATE WHETHER IT WAS
22 IDEOLOGICAL OR NOT, WHETHER IT WAS TAINTED BY RELIGION, AND
23 THAT IS A WHOLLY DIFFERENT INQUIRY THAN WHAT A PUBLIC HEALTH
24 OFFICER DOES IN SANTA CLARA COUNTY WHERE THEY FACTUALLY OBSERVE
25 WHETHER PEOPLE ARE GATHERING INDOORS, WHETHER THEY ARE WEARING

1 MASKS, WHETHER THEY ARE OBSERVING SOCIAL DISTANCING
2 REQUIREMENTS, WHETHER THEY HAVE A SOCIAL DISTANCING PROTOCOL ON
3 FILE WITH THE COUNTY, WHETHER THEY ARE SINGING INDOORS, AND
4 THESE ARE OBJECTIVELY EASILY OBSERVABLE THINGS THAT HAVE
5 NOTHING TO DO WITH THE CONTENT OF THE SPEECH OR ANYTHING TO DO
6 WITH RELIGIOUS DOCTRINE OR PRACTICE OR EXPRESSION. AND SO IT
7 DOESN'T RAISE THE ENTANGLEMENT CONCERN THAT LEMON EXPRESSED.

8 IF THERE ARE -- I THINK -- I HOPE I HAVE ANSWERED --
9 YOUR HONOR ASKED ONE QUESTION OF MS. GONDEIRO WHICH WAS, DOES
10 ROMAN CATHOLIC AND THE NINTH CIRCUIT DECISION IN CALVARY CHAPEL
11 MEAN THAT CHURCHES HAVE TO -- RELIGIOUS GATHERINGS HAVE TO BE
12 GIVEN THE SAME TREATMENT AS ANY OTHER ACTIVITY, AND I HOPE I
13 HAVE ADDRESSED THAT FOR YOUR HONOR.

14 THE COURT: YOU HAVE. THANK YOU.

15 ALL RIGHT. MR. GRABARSKY, DID YOU WANT TO MAKE ANY
16 COMMENTS?

17 MR. GRABARSKY: YES, YOUR HONOR, JUST A COUPLE MINOR
18 POINTS THAT MIGHT CLARIFY THE RECORD.

19 UNDER JUST SOME OF THE POINTS THAT THE ACTIVITIES THAT
20 MS. GONDEIRO HAD IDENTIFIED, IN THE STATE, CASINOS AND CARD
21 ROOMS ARE TREATED THE SAME AS WORSHIP SERVICES PRESENTLY. AND
22 THESE ARE, I THINK, SOME OF THE ACTIVITIES THAT THE
23 NINTH CIRCUIT LISTED IN THE CALVARY CHAPEL DAYTON VALLEY
24 OPINION. SO CASINOS ARE TREATED THE SAME IN CALIFORNIA AS
25 WORSHIP SERVICES, SAME WITH BOWLING ALLEYS, ARCADES AND

1 RESTAURANTS. SO JUST A POINT OF CLARIFICATION.

2 ALSO JUST TO NOTE TO ADDRESS THE SIXTH CIRCUIT CASE,
3 DURING THIS HEARING I GOT A FRANTIC E-MAIL FROM MY COLLEAGUES
4 THAT THE SUPREME COURT ACTUALLY DENIED THE APPLICATION TO STAY
5 THE SIXTH CIRCUIT DECISION IN COMMONWEALTH V. BESHEAR. I CAN
6 GIVE YOU THE SUPREME COURT CASE NUMBER. 20, A, AS IN ALPHA,
7 96. SO JUST TO GIVE YOU THE MOST CURRENT UPDATE.

8 THE COURT: IT IS CURRENT.

9 MR. GRABARSKY: YES.

10 AND THEN TO THE POINT, YOUR HONOR'S QUESTION, AND YOU
11 KNOW, AGAIN EMPHASIZE THAT THE STATE JOINS IN THE ARGUMENTS ON
12 THE BRIEFINGS WITH SANTA CLARA AND THE ARGUMENTS TODAY, BUT
13 JUST TO ADDRESS THE QUESTION ABOUT ROMAN CATHOLIC AND CALVARY
14 CHAPEL DAYTON VALLEY, WHETHER THEY MANDATE AUTOMATIC TREATMENT
15 OF WORSHIP SERVICES TO THE MOST FAVORABLE ACTIVITY THAT'S
16 TREATED THE MOST LENIENTLY. AND I THINK MR. WALL'S POINT ABOUT
17 HOSPITALS, THAT CAN'T BE THE CASE BECAUSE OF HOSPITALS.

18 I WILL JUST NOTE THAT, AND I BELIEVE MR. WALL ADDRESSED
19 THIS, BUT I JUST WANT TO EMPHASIZE THE FACT THAT THE SUPREME
20 COURT HAD THIS QUESTION BEFORE IT, AND THIS WAS THE HARVEST
21 ROCK MATTER, ABOUT A WEEK AFTER ROMAN CATHOLIC WAS ISSUED, THE
22 PLAINTIFFS IN CALIFORNIA, THE HARVEST ROCK MATTER, A CHURCH
23 LOCATED IN CALIFORNIA, ASKED THE SUPREME COURT, SAID HEY, YOU
24 GUYS JUST DECIDED ROMAN CATHOLIC, THEREFORE THAT MANDATES AN
25 AUTOMATIC INJUNCTION OF CALIFORNIA'S RESTRICTIONS.

1 RATHER THAN GRANTING THAT INJUNCTION, THE SUPREME COURT,
2 AS MR. WALL HAD SAID, REMANDED NOT TO THE APPELLATE COURT, THE
3 INTERMEDIARY APPELLATE COURT RATHER, BUT ALL THE WAY TO THE
4 DISTRICT COURT, TO MAKE A FACTUAL INQUIRY ABOUT CALIFORNIA'S
5 RESTRICTIONS IN PARTICULAR.

6 THE COURT: AND THIS IS THE CASE THAT WENT BACK TO
7 JUDGE BERNAL?

8 MR. GRABARSKY: YES, YOUR HONOR.

9 THE COURT: OKAY. HAS HE SET THIS FOR FURTHER
10 HEARING OR IS HE -- IS IT JUST UNDER SUBMISSION?

11 MR. GRABARSKY: NO, YOUR HONOR. THE HEARING IS SET
12 FOR, IN HARVEST ROCK FOR 2:00 P.M. TOMORROW.

13 AND I WILL ALSO NOTE IN THE SOUTH BAY, THE UNITED
14 PENTECOSTAL CHURCH CASE, SIMILAR TRAJECTORY, THAT THE
15 NINTH CIRCUIT VACATED AND REMANDED BACK TO THE DISTRICT COURT.
16 THIS IS BEFORE JUDGE BASHANT IN THE SOUTHERN DISTRICT. THE
17 BRIEFINGS ARE SUBMITTED AND THE HEARING IS SET FOR TOMORROW
18 MORNING, TO MAKE THAT FACTUAL INQUIRY ABOUT THE PARTICULARITIES
19 OF CALIFORNIA'S RESTRICTIONS IN PARTICULAR.

20 AND -- YEAH. SO I JUST WANTED TO ALERT THE COURT ON THAT.

21 THE COURT: THAT'S VERY HELPFUL. I ONLY READ WHAT I
22 READ IN THE NEWSPAPER ON WHAT JUDGE BERNAL WAS DOING. IT WAS
23 NOT CLEAR TO ME WHETHER HE HAD AN OPPORTUNITY TO RESET IT
24 BEFORE THE HOLIDAY.

25 MR. GRABARSKY: YES, YOUR HONOR, HE HAS.

1 THE COURT: OKAY.

2 MR. GRABARSKY: AND JUST ANOTHER POINT, FURTHER
3 DISTINGUISHING NEW YORK'S RESTRICTIONS THAT WERE AT ISSUE IN
4 ROMAN CATHOLIC, THOSE RESTRICTIONS APPLIED FOR OUTDOOR WORSHIP
5 AS WELL, ALONG WITH INDOOR, THE 10 OR 25-PERSON RESTRICTIONS;
6 WHEREAS IN CALIFORNIA, ANYWHERE IN THE STATE, WORSHIP SERVICES
7 MAY TAKE PLACE OUTDOORS IN UNLIMITED NUMBERS, THAT MAY NOT
8 FEATURE SINGING AND CHANTING.

9 THE COURT: I DON'T THINK SANTA CLARA ALLOWS THAT,
10 BUT THE STATE DOES.

11 MR. GRABARSKY: YES, YOUR HONOR. ACCORDING TO THIS,
12 YES, THAT'S CORRECT.

13 AND THEN FINALLY, WE HAVEN'T TALKED ALL THAT MUCH ABOUT
14 THE BALANCE OF EQUITIES, I WON'T DISCUSS IT IN GREAT DETAIL,
15 BUT I JUST WANTED TO EMPHASIZE THE FACT THAT STATEWIDE, ICU
16 CAPACITY IS ABOUT THREE PERCENT NOW. AND AS WE KNOW WITH HOW
17 THIS VIRUS TRANSMITS, YOU KNOW, ALTHOUGH PLAINTIFFS' CHURCHES
18 MIGHT BE LOCATED IN SANTA CLARA COUNTY, I MEAN, JUST THE WAY
19 THIS VIRUS SPREADS, IT CAN QUICKLY GO STATEWIDE.

20 THE STATE'S HOSPITAL, PUBLIC HEALTH RESOURCES, ARE
21 EXTREMELY TAXED RIGHT NOW, AS YOUR HONOR IS AWARE, AND
22 ESSENTIALLY THERE COULDN'T BE A WORSE TIME TO ENJOIN THE
23 STATE'S ORDERS, JUST GIVEN -- PUTTING ALL THE CONSTITUTIONAL
24 ANALYSIS AND THE FIRST AMENDMENT ANALYSIS ASIDE, THE COURT
25 STILL NEEDS TO CONSIDER THE BALANCE OF EQUITIES.

1 AND AGAIN, GIVEN WHAT WE KNOW WITH HOW THIS VIRUS SPREADS,
2 GIVEN THE INCIDENTS OF SUPER SPREADER EVENTS THAT ARE TIED TO
3 LARGE GATHERINGS, ALL TYPES OF LARGE GATHERINGS, INCLUDING
4 WORSHIP GATHERINGS, THERE IS REALLY A CLEAR DANGER HERE OF
5 ENJOINING THE STATE AND THE COUNTY'S CRUCIAL MEASURES TO
6 CONTROL THE VIRUS UNTIL, AS MR. WALL INDICATES, A VACCINE IS
7 WIDELY AVAILABLE THROUGHOUT THE ENTIRE STATE.

8 I'M HAPPY TO ANSWER ANY OTHER ADDITIONAL SPECIFIC
9 CLARIFICATION QUESTIONS.

10 THE COURT: THAT'S VERY HELPFUL. THANK YOU.

11 ALL RIGHT. MS. GONDEIRO, THIS IS YOUR MOTION, I'M GOING
12 TO LET YOU WRAP IT UP AND RESPOND TO WHAT MR. WALL AND
13 MR. GRABARSKY HAVE JUST SAID.

14 MS. GONDEIRO: OKAY. WELL, I WILL TRY TO MAKE THIS
15 AS SHORT AS POSSIBLE, IF THAT IS POSSIBLE.

16 THE COURT: I KNOW.

17 MS. GONDEIRO: SO I WANT TO START WITH THE
18 ABSTENTION, BECAUSE I KNOW, YOUR HONOR, THAT IS KIND OF THE
19 ISSUE THAT, AT THIS POINT, THAT REALLY NEEDS TO BE RESOLVED.

20 SO THE REASON WHY I BELIEVE YOUNGER DOES NOT APPLY HERE,
21 YOUR HONOR, IS IF YOU LOOK AT THE CASE CALLED HICKS V. MIRANDA,
22 THE COURT STATES THAT "A STATE PROCEEDING IS CONSIDERED TO BE
23 ONGOING WHEN STATE PROCEEDINGS ARE BEGUN AGAINST THE FEDERAL
24 PLAINTIFFS AFTER THE FEDERAL COMPLAINT IS FILED BUT BEFORE ANY
25 PROCEEDINGS OF SUBSTANCE ON THE MERITS HAVE TAKEN PLACE IN THE

1 FEDERAL COURT."

2 AS I STATED EARLIER, WE FILED A COMPLAINT IN JUNE AND THEN
3 THEY FILED MOTIONS TO DISMISS, AND WE WERE RIGHT IN THE MIDDLE
4 OF THOSE BRIEFINGS. A HEARING WAS CONDUCTED ON NOVEMBER 6TH.
5 AND SO THEY KEEP SAYING THAT WE WAITED FOR MONTHS, BUT THEY
6 ACTUALLY WAITED TO FILE THEIR STATE COURT PROCEEDING. THEY HAD
7 MONTHS. THEY HAD SINCE JUNE TO FILE THEIR STATE COURT
8 PROCEEDING, AND THEY DID NOT.

9 SO IT'S JUST -- THEY ARE CHANGING THE NARRATIVE, BUT I
10 JUST WANT TO MAKE SURE THAT IT IS CLEAR THAT WE HAD THIS
11 PROCEEDING, WE WERE RIGHT IN THE MIDDLE OF BRIEFING ON THE
12 MERITS OF A MOTION TO DISMISS, AND THEN THEY INTERVENED -- OR
13 THEY INTERFERED BY GOING TO STATE COURT.

14 THE COURT: AND I HAVE THE HICKS CITATION IN YOUR
15 REPLY BRIEF.

16 MS. GONDEIRO: THANK YOU.

17 SO IF THIS COURT STILL THINKS THAT YOUNGER APPLIES, I WILL
18 STILL ARGUE THAT THE HARM PRESENT HERE, THE IRREPARABLE HARM
19 RISES TO AN EXTRAORDINARY LEVEL. AS ELROD STATES, WHICH
20 BROOKLYN DIOCESE CITES TO, MINIMAL HARM CONSTITUTES
21 IRREPARABLE -- MINIMAL INFRINGEMENT ON FIRST AMENDMENT RIGHTS
22 CONSTITUTES IRREPARABLE INJURY.

23 THE COURT: IN THE CONTEXT OF A RESTRAINING TRO OR
24 PRELIMINARY INJUNCTION, NOT IN THE YOUNGER CONTEXT, CORRECT?

25 MS. GONDEIRO: YES.

1 BUT MY POINT IS, YOUR HONOR, THAT CONSTITUTES IRREPARABLE
2 INJURY. WHAT MAKES THIS EXTRAORDINARY IS THAT THIS ISN'T JUST
3 A MINIMAL INTRUSION, THEY ARE COMPLETELY BANNING ALL INDOOR
4 GATHERINGS FOR, POTENTIALLY, MONTHS.

5 THIS PRELIMINARY INJUNCTION ALLOWS OFFICERS TO GO ON THE
6 PREMISES AND MONITOR PEOPLE, WHICH AS YOU WILL SEE IN THE
7 DECLARATION, CAUSES A LOT OF DISCOMFORT. PEOPLE DON'T WANT TO
8 BE WATCHED, ESPECIALLY IN THE MOST INTIMATE SETTING, IN A
9 PRAYER ROOM, WHERE YOU ARE TRYING TO JUST BE ALONE WITH JESUS.
10 AND THAT'S THE WORST FEELING TO --

11 THE COURT: NOW, MY UNDERSTANDING, THAT'S ALONE WITH
12 600 PEOPLE; IS THAT CORRECT RIGHT NOW?

13 MS. GONDEIRO: SORRY, WHAT WAS THAT?

14 THE COURT: THAT'S ALONE WITH 600 PEOPLE.

15 MS. GONDEIRO: WELL, THEY ALSO SEND ENFORCEMENT
16 OFFICERS, YOUR HONOR, DURING PRAYER MEETINGS WHERE THERE'S
17 ONLY --

18 THE COURT: I'M SORRY, I HAVEN'T HAD THE PLEASURE OF
19 BEING AT YOUR CHURCH. I DON'T KNOW HOW MANY PEOPLE ATTEND A
20 PRAYER MEETING OR WHAT SIZE ROOM THAT IS, I'M NOT FAMILIAR.

21 MS. GONDEIRO: PRAYER MEETINGS ARE ABOUT 10, 15
22 PEOPLE.

23 THE COURT: OKAY.

24 MS. GONDEIRO: AND SO THAT'S A VERY INTIMATE SETTING,
25 AND TO HAVE SOMEONE COME IN AND WATCH YOU IS VERY

1 DISCOMFORTING, TO SAY THE LEAST. SO THAT'S ANOTHER REASON WHY.

2 AND ON TOP OF THAT, YOUR HONOR, MY CLIENT IS NOW FACING
3 CONTEMPT CHARGES WHERE HE COULD HAVE TO PAY UP TO \$55,000 IN
4 SANCTIONS. AGAIN, THIS ORDER, THE PROPOSED -- THE CONTEMPT
5 ORDER HAD NOT BEEN FILED BY THE TIME I FILED THIS TRO. AND SO
6 IF YOU WOULD LIKE, I CAN ALSO ATTACH THAT, YOUR HONOR.

7 THE COURT: NO, I DON'T THINK I NEED THAT.

8 MS. GONDEIRO: BUT THIS TYPE OF CONTEMPT, YOUR HONOR,
9 I MEAN, THIS COULD BANKRUPT A CHURCH. SO ON TOP OF THE
10 CONSTITUTIONAL SIGNIFICANT INTRUSIONS, WE NOW HAVE FINANCIAL
11 HARM THAT COULD LITERALLY DESTROY A CHURCH. AND SO THESE TWO
12 FACTORS MAKE THE IRREPARABLE HARM RISE TO THE EXTRAORDINARY
13 LEVEL.

14 AND I WANT TO GO BACK TO THE NEUTRAL -- THE COUNTY INSISTS
15 THAT THE ORDERS ARE NEUTRAL, BUT IF YOU LOOK AT PAGE 3 OF THE
16 SUPREME COURT DECISION IN BROOKLYN DIOCESE, IT'S VERY CLEAR,
17 YOUR HONOR, THAT THEY ARE -- THEY KEEP APPLYING A VERY NARROW
18 COMPARISON WHERE THEY ARE LOOKING AT SIMILAR GATHERINGS.

19 THEY DON'T DO THAT HERE. THEY COMPARE THE CHURCH SETTINGS
20 WITH OTHER ESSENTIAL BUSINESSES. AND I WILL ALSO NOTE THAT IN
21 THE RED ZONE, TEN PEOPLE MAY BE ALLOWED AT CHURCH, WHILE OTHER
22 ESSENTIAL BUSINESSES CAN OPEN.

23 HERE, YOUR HONOR, INDOOR GATHERINGS AT THIS POINT ARE
24 COMPLETELY BANNED. SO IT'S ACTUALLY MORE SEVERE, NOT LESS
25 SEVERE.

1 AND AGAIN, THIS WAS CONFIRMED IN THE NINTH CIRCUIT WHERE,
2 AGAIN, THE NINTH CIRCUIT DIDN'T JUST LOOK AT SIMILAR
3 GATHERINGS, IT COMPARED OTHER BUSINESSES TO RELIGIOUS WORSHIP
4 SERVICES.

5 SO IT'S VERY CLEAR, YOUR HONOR, AND JUSTICE KAVANAUGH, HE
6 ALSO MAKES IT VERY, VERY CLEAR, BECAUSE THE STATE BROUGHT THIS
7 SAME ARGUMENT IN THAT CASE, HE SAYS, "ONCE A STATE CREATES A
8 FAVORED CLASS OF BUSINESSES, AS NEW YORK DID, THE STATE MUST
9 JUSTIFY WHY HOUSES OF WORSHIP ARE EXCLUDED."

10 AND FINALLY, YOUR HONOR, THEY MENTION THAT ONE OF THE
11 REASONS WHY THIS CASE IS DISTINGUISHABLE IS BECAUSE OUR CLIENTS
12 ARE NOT SOCIALLY DISTANCING OR WEARING MASKS, BUT THAT IS ALSO
13 A DISPUTED FACT AND IRRELEVANT.

14 THAT WAS NOT -- THE SUPREME COURT YOUR HONOR DID NOT
15 ADDRESS THOSE RESTRICTIONS AND HOLD THAT THOSE RESTRICTIONS
16 WERE NOT -- WERE UNCONSTITUTIONAL. WHAT WAS AT ISSUE THERE
17 WERE THE CAPACITY LIMITATIONS. SO ALL OF THAT WAS JUST --

18 THE COURT: WELL, I THINK IT WAS CAPACITY IN LIGHT OF
19 COMPLIANCE ON EVERYTHING ELSE.

20 MS. GONDEIRO: YES, YES. BUT IT WAS ALL DICTA AND
21 IRRELEVANT, YOUR HONOR.

22 THE COURT: THAT'S FAIR.

23 MS. GONDEIRO: SO AGAIN, THANK YOU FOR YOUR TIME,
24 YOUR HONOR, AND I ASK THAT IF THIS COURT IS INCLINED TO GRANT
25 THIS TRO, THAT YOU GIVE US THE OPPORTUNITY TO AMEND THE

1 PROPOSED ORDER, BECAUSE SIGNIFICANT DEVELOPMENTS HAVE HAPPENED,
2 INCLUDING THE CONTEMPT HEARING WHERE NOW THE COURT HAS FOUND
3 HIM IN CONTEMPT IN ADDITION TO ISSUING THE PRELIMINARY
4 INJUNCTION.

5 THE COURT: OKAY.

6 WELL, OF COURSE WE TAKE IT ONE STEP AT A TIME. AND IN ANY
7 CIRCUMSTANCE WHERE A COURT ISSUES A TRO OR A PRELIMINARY
8 INJUNCTION, THERE IS ALWAYS THE OPPORTUNITY TO MODIFY TO MAKE
9 IT LESS RESTRICTIVE OR MORE RESTRICTIVE. AND SO CERTAINLY AS
10 THE COUNTY MODIFIED THE TRO IN MAKING IT MORE RESTRICTIVE, I
11 RECOGNIZE THAT, THE SAME OPPORTUNITY EXISTS.

12 SO IT IS MY GOAL TO GET AN ORDER OUT, I WOULD SAY,
13 REALISTICALLY, ON MONDAY. I'M GOING TO TRY TO DO IT BY
14 TOMORROW, BUT IT'S 4:00 NOW ON THURSDAY, SO I'M NOT SURE THAT
15 THAT'S -- I CAN'T GUARANTEE THAT, BUT MONDAY IS PROBABLY THE
16 BEST THAT I CAN DO.

17 AND I DON'T KNOW WHAT ELSE I CAN SAY. YOU KNOW, I WILL
18 GIVE IT MY -- I'M GOING TO HAVE TO GET AN ORDER OUT ON A
19 TEMPORARY RESTRAINING ORDER, OF COURSE IT'S NOT THE SAME LENGTH
20 OF A DOCUMENT AS WE WOULD DO ON A PRELIMINARY INJUNCTION, BUT
21 YOU NEED A RESULT AND I CERTAINLY RESPECT THAT.

22 AND SO THAT'S MY BEST ESTIMATE, AND I THINK THAT -- I
23 DON'T THINK ANYTHING IS HAPPENING IN THE STATE COURT OVER
24 TOMORROW OR MONDAY, IS THERE, MS. GONDEIRO?

25 MS. GONDEIRO: WE DO HAVE A MOTION FOR

1 RECONSIDERATION.

2 THE COURT: WELL, THAT YOU WOULD LIKE TO DO. AND
3 WHEN IS THAT SET?

4 MS. GONDEIRO: I DON'T BELIEVE THE COURT HAS SET AN
5 ACTUAL HEARING DATE YET AT THIS TIME.

6 THE COURT: OKAY. AND THE COURT MAY NOT. I DON'T
7 KNOW WHAT THE SUPERIOR COURT LOCAL RULES ARE OR THE STATE, I
8 DON'T REMEMBER THE STATE RULES OF COURT, I GUESS, ON
9 RECONSIDERATION, IT'S BEEN TOO MANY YEARS NOW FOR ME. BUT YOU
10 DON'T HAVE ANY HEARING, THAT'S FINE. AND IT'S SOMETHING THAT
11 YOU PUT IN PLACE, IT'S NOT SOMETHING THAT COULD HARM YOU, IS
12 REALLY WHAT I WAS LOOKING FOR.

13 MS. GONDEIRO: YES, YES.

14 THE COURT: OKAY. GOOD. IT CAN ONLY BENEFIT YOU.

15 ALL RIGHT. WELL, I WANT TO THANK YOU ALL FOR REALLY
16 EXCELLENT ARGUMENT. I KNOW I PUT SOME POINTED QUESTIONS TO
17 YOU. THESE ARE VERY IMPORTANT ISSUES FROM BOTH SIDES. THESE
18 ARE VERY IMPORTANT AND NO ONE IS SUGGESTING THAT THE ISSUES
19 AREN'T REALLY CRITICAL ALL THE WAY AROUND ON THE FIRST
20 AMENDMENT RIGHT OF FREEDOM OF RELIGION AND FREE EXERCISE AND
21 THE PUBLIC HEALTH CRISIS THAT WE ARE IN NOW.

22 SO I CAN ONLY HOPE THAT ALL OF YOU WILL STAY HOME, STAY
23 SAFE, SAY HEALTHY, AND WHAT I EXPECT IS THAT I WILL FILE MY
24 ORDER FOR YOU ON MONDAY, SO YOU WILL HAVE THAT. AND BY THE END
25 OF TODAY, YOU WILL EITHER CONFIRM, MS. GONDEIRO, THAT THE

1 EXHIBITS MR. WALL GAVE US ARE THE ONES YOU WANT ME TO CONSIDER
2 AND YOU AGREE, OR YOU WILL GIVE ME THEM AS EXHIBITS THAT YOU
3 WILL FILE ONLINE.

4 MS. GONDEIRO: YES.

5 THE COURT: AND THAT IS VERY HELPFUL. AND I'M HOPING
6 THAT WHAT THE COUNTY HAS DONE WILL EASE YOUR JOB ON THAT AND
7 YOU CAN SIMPLY AGREE, OR OTHERWISE YOU CAN GATHER THEM FOR ME.

8 MS. GONDEIRO: YES.

9 THANK YOU, YOUR HONOR.

10 THE COURT: ALL RIGHT.

11 MR. WALL, ANYTHING ELSE?

12 MR. WALL: NO, YOUR HONOR.

13 THE COURT: ALL RIGHT.

14 WELL, THANK YOU ALL. AND HAPPY HOLIDAYS TO ALL OF YOU.
15 AND I WILL -- I WON'T HAVE ANYTHING ELSE SCHEDULED IN THIS CASE
16 AFTER THIS COMES OUT UNTIL YOU FILE SOMETHING.

17 ALL RIGHT. SO LONG EVERYONE.

18 MS. GONDEIRO: THANK YOU, YOUR HONOR.

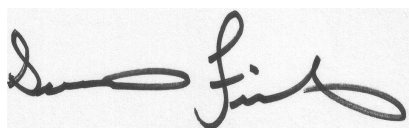
19 MR. WALL: THANK YOU, YOUR HONOR.

20 (THE PROCEEDINGS WERE CONCLUDED AT 4:05 P.M.)
21
22
23
24
25

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT
REPORTER OF THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH
FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY
CERTIFY:

THAT THE FOREGOING TRANSCRIPT,
CERTIFICATE INCLUSIVE, CONSTITUTES A TRUE, FULL AND
CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS
SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS
HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER-AIDED
TRANSCRIPTION TO THE BEST OF MY ABILITY.

A handwritten signature in black ink, appearing to read "Summer A. Fisher", is written over a light gray rectangular background.

SUMMER A. FISHER, CSR, CRR
CERTIFICATE NUMBER 13185

DATED: 10/14/21